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7 THOMAS ALLEN BARNETT,  
8 Plaintiff,  
9 v.  
10 WILLIAM J. KAPLA, et al.,  
11 Defendants.  
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Case No. 20-cv-03748-JCS

**ORDER GRANTING IN PART AND  
DENYING IN PART THE REGENTS'  
AND DR. KAPLA'S MOTIONS TO  
DISMISS SECOND AMENDED  
COMPLAINT**

Re: Dkt. Nos. 38, 41

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13 **I. INTRODUCTION**

14 Plaintiff Thomas Allen Barnett alleges that he was sexually harassed and assaulted by  
15 Defendant William Kapla, M.D., his clinical professor at the University of California, San  
16 Francisco School of Medicine (UCSF), and that UCSF responded to his report of sexual  
17 misconduct with deliberate indifference. On January 24, 2020, Plaintiff filed the present action in  
18 state court against Defendants Dr. Kapla and the Regents of the University of California (the  
19 “Regents”). Subsequently, Defendants removed the action to federal court and moved to dismiss  
20 Plaintiff’s claims. The Court dismissed all of Plaintiff’s claims, but granted him leave to amend  
21 most of them. Order (dkt. 36). On October 16, 2020, Plaintiff filed the operative complaint,  
22 asserting one federal claim against the Regents and six state claims against Dr. Kapla. *See* Second  
23 Am. Compl. (“SAC,” dkt. 37). In separate motions, Defendants again seek dismissal of Plaintiff’s  
24 claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See* Regents Mot. (dkt. 38);  
25 Kapla Mot. (dkt. 41). The Court held a hearing on December 11, 2020 at 9:30 a.m. For the  
26 reasons below, the motions are GRANTED in PART and DENIED in PART.<sup>1</sup>

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28 <sup>1</sup> The parties have consented to the jurisdiction of the undersigned magistrate judge pursuant to 28  
U.S.C. § 636(c).

**II. INTRODUCTION****A. Second Amended Complaint****1. Facts Alleged**

In August 2015, Plaintiff enrolled as a medical student at UCSF. SAC ¶ 12; *see id.* ¶ 6. As part of his curriculum, Plaintiff was assigned to a family medicine clerkship with Dr. Kapla, a UCSF Volunteer Clinical Faculty member. *Id.* ¶¶ 2–3, 9–11, 14, 30–31.

Throughout the clerkship, which began on June 26, 2017 and ended on August 20, 2017, Plaintiff was sexually harassed by Dr. Kapla. *Id.* ¶¶ 14, 27. An incomplete summary of Plaintiff's description of Dr. Kapla's behavior follows. First, “[m]any of Dr. Kapla's patients were gay men in their 40's and 50's,” and when Dr. Kapla and Plaintiff met with gay male patients, Dr. Kapla would comment on Plaintiff's appearance and serve as “the master of ceremonies,” leading patients into lengthy conversations involving “sexual comments and innuendos” about Plaintiff. *Id.* ¶ 25. When one patient responded that he wanted to “bend over [Plaintiff] and be sexual with him,” Dr. Kapla laughed. *Id.* Second, Dr. Kapla “freely instructed” Plaintiff “to physically touch and examine patients . . . in a non clinical way.” *Id.* During hernia exams, Dr. Kapla “would encourage [Plaintiff] to keep his finger in a patient's anus for longer periods than were medically necessary.” *Id.* Third, Dr. Kapla would make inappropriate, non-medical comments about patients to Plaintiff, including comments about “the size, shape and other characteristics” of patients' penises. *Id.*; *see id.* ¶ 27.

Additionally, Dr. Kapla would “constantly” tell Plaintiff that he was “cute” and “handsome” and tried “to engage [him] in inappropriate sexual conversations.” *Id.* ¶ 25. For example, Dr. Kapla asked Plaintiff whether he enjoyed various sexual acts and which characteristics he found desirable in a sexual partner. *Id.* ¶¶ 25, 27. Also, when Plaintiff told Dr. Kapla that he would be traveling to England, Dr. Kapla gave him “unsolicited advice on where to get poppers and other sex drugs” and shoved a prescription into Plaintiff's pocket to “help with the flight.” *Id.* ¶ 28. Lastly, Dr. Kapla “would consistently get physically close” to Plaintiff, often touching his legs, knees, and shoulders without permission. *Id.* ¶ 26.

1       Born in Utah, Plaintiff had a “conservative Mormon upbringing.” *Id.* ¶ 12. While an  
2 undergraduate at Brigham Young University, Plaintiff “came to the consciousness that he was  
3 gay,” but coming out was “a challenge,” given Plaintiff’s background. *Id.* As a “recently out  
4 young gay man,” Plaintiff alleges that he was “intimidated” by Dr. Kapla, who was a “professor”  
5 with “the power to affect [Plaintiff’s] standing in the [UCSF] community.” *Id.* ¶ 29. Plaintiff  
6 “was emotionally traumatized and contemplated not returning to [UCSF].” *Id.*

7       Before, during, and after his clerkship with Dr. Kapla, Plaintiff was a patient of Dr.  
8 Vittorio Comelli, a UCSF professor and the Assistant Director of UCSF’s Medical Students Well-  
9 Being Program. *Id.* ¶¶ 21–22, 38. UCSF paid for these therapy sessions. *Id.* ¶ 23. At one session  
10 with Dr. Comelli, Plaintiff “indicated that . . . he was being treated inappropriately at the Kapla  
11 Clinic, and was a victim of sexual harassment.” *Id.* ¶ 24. Dr. Comelli informed Plaintiff that he  
12 was required to report the alleged sexual harassment to Dean Lee Jones and the Title IX office. *Id.*  
13 “As soon as” Dr. Comelli did so, Dean Jones “appropriately guaranteed” Plaintiff that he would  
14 not need to return to Dr. Kapla’s clinic. *Id.*; *see id.* ¶¶ 30, 49, 52.

15       Although UCSF “appropriately removed” Plaintiff from the clinic, *id.* ¶ 14, UCSF was  
16 “unable to find a substitute clinic for [Plaintiff] to complete his training immediately,” *id.* ¶ 32.  
17 Plaintiff “[u]ltimately” did one session in an alternate family medicine clinic, but “the situation  
18 was aggravated by his [post-traumatic stress disorder (PTSD)] suffered at the hands of Dr. Kapla,  
19 and he was unable to complete the [clerkship].” *Id.* The following semester, Plaintiff was  
20 “supposed to find himself” another family medicine clerkship, in addition to completing a new  
21 rotation in internal medicine. *Id.* ¶ 33. Plaintiff believes that he “still has the grade of  
22 ‘incomplete’ ” for the family medicine rotation, *id.*, due to UCSF’s failures to “assist Plaintiff into  
23 a new program,” *id.* ¶ 40, and/or to help him “prepar[e] a statement of what occurred at the Kapla  
24 Clinic to explain his incomplete grade and his PTSD symptoms,” *id.* ¶ 42. *See id.* ¶ 43.

25       On October 24, 2017, UCSF’s Title IX officer, Andrea LaCampagne, conducted an “Intake  
26 Interview” with Plaintiff. *Id.* ¶ 31. According to Ms. LaCampagne’s interview notes, Plaintiff  
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1 described Dr. Kapla's alleged misconduct (summarized above) in detail.<sup>2</sup> *See id.* Additionally,  
2 Plaintiff told Ms. LaCampagne that Dr. Kapla was "intrigued" by Plaintiff's background and  
3 "worked hard" to get Plaintiff into his clinic. *Id.* Plaintiff explained that he "felt bonded" to Dr.  
4 Kapla; although he is usually "quiet about his sexual orientation," he confided in Dr. Kapla that he  
5 is gay. *Id.* At the same time, Plaintiff felt "trapped" in the clerkship and obligated to stay late  
6 "while [Dr. Kapla] talked to him," often about non-medical issues. *Id.* Ms. LaCampagne's notes  
7 also indicate that Plaintiff's clerkship "was supposed to end in December, but [Plaintiff] left early  
8 with 4–5 session [sic] left in his clerkship (8–10 weeks early)." *Id.*

9 Aside from this interview, Plaintiff alleges, the Title IX office "did little else that [it was]  
10 required to do." *Id.* ¶ 24; *see id.* ¶¶ 3, 41–43, 48–49. Because Dr. Kapla served as a "volunteer  
11 clinical professor," Ms. LaCampagne "remained concerned that [UCSF] 'did not have  
12 jurisdiction' " over him. *Id.* ¶ 34. Subsequently, Ms. LaCampagne "was relieved of [that]  
13 erroneous belief," and she "told Plaintiff that he need not retain a lawyer" and that the Title IX  
14 office would "do the work and conduct the investigation." *Id.*; *see id.* ¶¶ 35, 46.

15 Ms. LaCampagne referred Plaintiff to Denise Caramagno, a CARE advocate and the  
16 Director of Campus Advocacy Resources and Education for sexual assault and gender-based  
17 violence at UCSF. *Id.* ¶ 35. When Plaintiff asked Ms. Caramagno whether he needed a lawyer,  
18 she "told him that she was there as his advocate and referred him to [UCSF's] Care Advocacy  
19 Resources and Education website." *Id.* ¶ 36; *see id.* ¶ 46. Plaintiff reviewed the website and  
20 "believed the representations of Ms. LaCampagne and Ms. Caramagno" that he "did not need to  
21 retain counsel." *Id.* ¶ 37.

22 In late November 2017 or early January 2018, Plaintiff attended another therapy session  
23 with Dr. Comelli. *Id.* ¶ 38. When Plaintiff asked Dr. Comelli whether he should hire a lawyer,  
24 Dr. Comelli "became agitated at Plaintiff for raising the 'lawyer' issue" and "berated Plaintiff,  
25 indicating that the sexual harassment he experienced at the Kapla Clinic was somehow  
26 'brought on by' or 'invited by' Plaintiff." *Id.* ¶ 39; *see id.* ¶¶ 38, 47.

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<sup>2</sup> A copy of Ms. LaCampagne's notes does not appear in the record.

1 On October 16, 2018, Ms. LaCampagne sent the following to Plaintiff in an e-mail:<sup>3</sup>

2 I apologize for the late notice, but as I was reviewing my case files became [sic]  
3 aware that I did not send you a notice that your complaint was closed by our office.  
4 [The Office for the Prevention of Harassment and Discrimination] closed your  
complaint against Dr. William Kapla, [Volunteer Clinical Faculty], on July 24, 2018.

5 *Id.* ¶ 41. Prior to this date, Plaintiff alleges, UCSF had “lulled [him] by constantly advising him  
6 that the entire matter would be resolved within the University.” *Id.* ¶ 49.

7 According to Plaintiff, UCSF’s response to his report of sexual misconduct constituted  
8 “deliberate indifference.” *Id.* ¶ 40. Specifically, UCSF’s failed to conduct its investigation with  
9 “clarity, fairness, or timeliness”; to give him periodic updates on the complaint process; to  
10 appropriately discipline or sanction Dr. Kapla; to comply with the University of California’s  
11 policies and the U.S. Department of Education’s guidance; to ensure that Plaintiff’s experience of  
12 sexual harassment and assault did not cause “potential academic defects in his record” by failing  
13 to assist him in finding a second alternate family medicine clerkship and/or in “preparing a  
14 statement of what occurred at the Kapla Clinic to explain his incomplete grade and his PTSD  
15 symptoms”; and to pay for private therapy after Dr. Comelli’s accusations. *Id.* ¶¶ 40, 42–43; *see id.* ¶¶ 3, 13–15, 17–18, 24, 48–49, 52–53. Plaintiff also alleges that Dr. Comelli’s comments  
16 themselves amount to deliberate indifference. *Id.* ¶¶ 40, 42, 43; *see id.* ¶¶ 38–40, 47, 52.

17 “As a result of [UCSF’s] conduct, and lack of conduct,” Plaintiff alleges that he “has  
18 suffered psychological and emotional damages, and has experienced a loss of education  
19 opportunities and/or benefits.” *Id.* ¶ 43. Specifically, Plaintiff was “forced” to drop a class and to  
20 take a reduced course load the following semester, which required him to “stay in school for extra  
21 time.” *Id.* Furthermore, Plaintiff was diagnosed with PTSD, had “[s]ignificantly higher amounts  
22 of absences from classes”; “withdr[ew] from participation in extra curricular [sic] activities”; and  
23 experienced a “significant reduction in the enjoyment of his academic experience at [UCSF].” *Id.*  
24 Finally, Plaintiff “avoid[ed] enrollment or participation in . . . activities [for gay students] on  
25 campus for fear of seeing Dr. Kapla.” *Id.*

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28 <sup>3</sup> A copy of this e-mail does not appear in the record.

1       Prior to Plaintiff's experience of sexual misconduct, in June 2014, the California State  
2 Auditor published a report titled "Sexual Harassment and Sexual Violence: California Universities  
3 Must Better Protect Students by Doing More to Prevent, Respond to, and Resolve Incidents."<sup>4</sup> *Id.*  
4 ¶ 44. The report detailed several deficiencies in the University of California's schools' handling  
5 of reports of sexual misconduct. *Id.* ¶ 45. Additionally, on March 2, 2017, the Chancellor of  
6 UCSF, Sam Hawgood, sent a letter addressing sexual misconduct to the members of the UCSF  
7 community—including Plaintiff and Dr. Kapla.<sup>5</sup> *Id.* ¶ 2. The letter stated that "between January  
8 1, 2013 and April 6, 2016, at the ten campuses of the University of California," there were 113  
9 reported violations of the Title IX Sexual Violence and Sexual Harassment Policy, including 26  
10 cases at UCSF." *Id.* In the letter, Chancellor Hawgood assured students that UCSF "ha[d] taken  
11 actions to both raise awareness of sexual violence and sexual harassment as well as to protect and  
12 support every member of the UCSF community" and that UCSF was committed to "clarity,  
13 fairness and timeliness" in its investigations and appropriate "remedies or disciplinary actions" for  
14 reports of sexual misconduct. *Id.* Plaintiff alleges, "This is a case of [UCSF's] failures of these  
15 representations." *Id.* ¶ 3.

16       Finally, Plaintiff alleges that UCSF "had an obligation to, and did in fact advise Dr. Kapla  
17 of the charges against him by Plaintiff." *Id.* ¶ 20. According to "records obtained from UCSF,"  
18 UCSF would notify Dr. Kapla that he was "no longer a volunteer due to a 'severe' complaint of  
19 sexual harassment against him."<sup>6</sup> *Id.* Consequently, Plaintiff alleges, Dr. Kapla "had ample  
20 opportunity to gather evidence and to avoid prejudice in the event of litigation." *Id.*

21       **2. Claims Asserted**

22       Plaintiff asserts one federal claim against the Regents: discrimination on the basis of sex in  
23 violation of 20 U.S.C. § 1681 ("Title IX") ("Claim One"). Plaintiff's remaining six claims arise  
24 under state law and are brought against Dr. Kapla: negligence ("Claim Two"); intentional  
25 infliction of emotional distress ("Claim Three"); assault ("Claim Four"); battery ("Claim Five");

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27       <sup>4</sup> In its prior order, the Court took judicial notice of the existence of this report. Order at 11 n.22;  
see dkt. 20-1 (Plaintiff's request for judicial notice).

28       <sup>5</sup> A copy of Dean Hawgood's letter does not appear in the record.

<sup>6</sup> Copies of these records do not appear in the record.

1 sexual harassment (“Claim Six”); and breach of the covenant of good faith and fair dealing  
2 (“Claim Seven”).

3 **B. Regents’ Motion**

4 The Regents move to dismiss Plaintiff’s Title IX claim for failure to state a claim. *See*  
5 Regents Mot. In answer to Plaintiff’s allegations concerning UCSF’s response to Plaintiff’s report  
6 of sexual misconduct, the Regents argue that Plaintiff’s post-harassment/assault Title IX claim  
7 fails because he has not adequately alleged (1) the fourth element that UCSF acted with deliberate  
8 indifference and (2) the fifth element that UCSF’s alleged deliberate indifference caused Plaintiff  
9 to experience further sexual harassment or assault or made him vulnerable to such. *See id.* at 2, 6–  
10 10. In response to Plaintiff’s allegations regarding UCSF’s conduct before Plaintiff’s was  
11 allegedly sexually harassed and assaulted, the Regents argue that any pre-harassment/assault Title  
12 IX claim fails because (1) Plaintiff has not adequately alleged causation and (2) equitable tolling  
13 cannot save the otherwise-time-barred claim. *See id.* at 2, 10–13.

14 **C. Dr. Kapla’s Motion**

15 In his motion, Dr. Kapla asks the Court to dismiss each of Plaintiff’s state claims because  
16 they are “time barred on their face.” Kapla Mot. at 1. Additionally, Dr. Kapla argues that Plaintiff  
17 cannot satisfy the necessary elements for the application of equitable tolling—(1) that Dr. Kapla  
18 had notice of Plaintiff’s claims and intent to litigate, (2) that the application of equitable tolling  
19 would not prejudice Dr. Kapla, and (3) that Plaintiff acted reasonably and with good faith. *See id.*  
20 at 4–9.

21 **D. Plaintiff’s Oppositions**

22 In his opposition to the Regents’ motion, Plaintiff contends that he has adequately alleged  
23 the fourth and fifth elements of his post-harassment/assault Title IX claim. *See* Opp’n to Regents  
24 Mot. (dkt. 43) at 1–8. Plaintiff also argues that equitable tolling does apply to his Title IX claim,  
25 but he does not distinguish between the pre- and post-harassment/assault theories of liability, and  
26 he does not respond to the Regents’ argument that he has failed to adequately allege causation in  
27 support of any pre-harassment/assault claim. *See id.* at 8–10. In his opposition to Dr. Kapla’s  
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1 motion, Plaintiff contends that he has alleged the necessary elements for the application of  
2 equitable tolling to his state claims.<sup>7</sup> *See* Opp'n to Kapla Mot. (dkt. 45).

3 **E. Defendants' Replies**

4 In their replies, the defendants generally repeat the arguments that they raised in their  
5 motions. *See* Regents Reply (dkt. 46); Kapla Reply (dkt. 47). The Regents also contend that  
6 Plaintiff has "effectively abandon[ed]" any pre-harassment/assault Title IX claim by failing to  
7 "address any pre-harassment conduct" by UCSF in his opposition to the Regents' motion. *See*  
8 Regents Reply at 1, 5 (citation omitted).

9 **III. ANALYSIS**

10 **A. Legal Standards Under Rule 12(b)(6)**

11 A complaint may be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure  
12 for failure to state a claim upon which relief can be granted. "The purpose of a motion to dismiss  
13 under Rule 12(b)(6) is to test the legal sufficiency of the complaint." *N. Star Int'l v. Ariz. Corp.*  
14 *Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). Generally, a plaintiff's burden at the pleading stage  
15 is relatively light. Rule 8(a) of the Federal Rules of Civil Procedure states that a "pleading which  
16 sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing  
17 that the pleader is entitled to relief." Fed. R. Civ. P. 8(a).

18 In ruling on a motion to dismiss under Rule 12(b)(6), the court analyzes the complaint and  
19 takes "all allegations of material fact as true and construe[s] them in the light most favorable to the  
20 non-moving party." *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).  
21 Dismissal may be based on a lack of a cognizable legal theory or on the absence of facts that  
22 would support a valid theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.  
23 1990). A complaint must "contain either direct or inferential allegations respecting all the material

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<sup>7</sup> Plaintiff also argues that Dr. Kapla's motion should be denied because it was untimely filed.  
26 *See* Opp'n to Kapla Mot. at 1. Under Federal Rule of Civil Procedure 12(a)(1)(A)(i), a defendant  
27 may file a motion to dismiss a complaint "within 21 days after being served with the summons and  
complaint." According to Plaintiff's counsel's certification of service attached to the end of the  
Second Amended Complaint, Dr. Kapla was served on October 16, 2016. SAC at 32. Dr. Kapla's  
motion was timely filed on November 6, the 21st day after he was served. *See Rasooly v. Cal.*,  
No. 14-cv-04521-JSC, 2015 WL 1222167, at \*4 n.5 (N.D. Cal. Mar. 17, 2015).

1 elements necessary to sustain recovery under some viable legal theory.” *Bell Atl. Corp. v.*  
2 *Twombly*, 550 U.S. 544, 562 (2007) (citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101,  
3 1106 (7th Cir. 1984)). “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation  
4 of the elements of a cause of action will not do.’ ” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)  
5 (quoting *Twombly*, 550 U.S. at 555). “[C]ourts ‘are not bound to accept as true a legal conclusion  
6 couched as a factual allegation.’ ” *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S.  
7 265, 286 (1986)). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of  
8 ‘further factual enhancement.’ ” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557)  
9 (alteration in original). Rather, the claim must be “‘plausible on its face,’ ” meaning that the  
10 plaintiff must plead sufficient factual allegations to “allow[] the court to draw the reasonable  
11 inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting *Twombly*, 550 U.S.  
12 at 570).

13 If the expiration of the applicable statute of limitations is apparent from the face of the  
14 complaint, the defendant may raise a statute of limitations defense in a Rule 12(b)(6) motion to  
15 dismiss. *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980). This is true even  
16 though expiration of the limitations period is an affirmative defense, because Rule 9(f) of the  
17 Federal Rules of Civil Procedure “makes averments of time and place material for the purposes of  
18 testing the sufficiency of a complaint.” *Suckow Borax Mines Consol. v. Borax Consol.*, 185 F.2d  
19 196, 204 (9th Cir. 1950). When a motion to dismiss is based on the running of the statute of  
20 limitations, “it can be granted only if the assertions of the complaint, read with the required  
21 liberality, would not permit the plaintiff to prove that the statute was tolled.” *Jablon*, 614 F.2d at  
22 682. In contrast, where the statute of limitations question turns on factual issues that may be  
23 disputed, the question is more appropriately addressed at a later stage of the proceeding. *See id.*

24 **B. Whether Plaintiff’s Title IX Claim (Claim One) Fails to State a Title IX Claim**

25 **1. Elements of a Title IX Claim**

26 Title IX of the Education Amendments of 1972 provides, with certain exceptions not at  
27 issue here, that “[n]o person in the United States shall, on the basis of sex, be excluded from  
28 participation in, be denied the benefits of, or be subjected to discrimination under any education

1 program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a). A victim of sex  
 2 discrimination has a private right of action against a recipient of federal education funding for  
 3 alleged Title IX violations. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 709 (1979). But a funding  
 4 recipient “may be liable in damages under Title IX only for its own misconduct”; in other words,  
 5 the funding recipient itself must “‘exclud[e] [persons] from participation in, . . . den[y] [persons]  
 6 the benefits of, or . . . subjec[t] [persons] to discrimination under’ its ‘program[s] or activit[ies]’ ”  
 7 in order to be liable for damages under Title IX. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629,  
 8 640–41 (1999) (quoting 20 U.S.C. § 1681(a)). In order “to eliminate ‘any risk that the recipient  
 9 would be liable in damages not for its own official decision but instead for its employees’  
 10 independent actions,’ ” the Supreme Court has “imposed” the “high standard” of “deliberate  
 11 indifference” for damages liability. *Id.* at 643 (quoting *Gebser v. Lago Vista Indep. Sch. Dist.*, 524  
 12 U.S. 274, 290–91 (1998)). Accordingly, a recipient is subject to damages liability only if it has an  
 13 “official policy” that discriminates on the basis of sex *or* if “an official who at a minimum has  
 14 authority to address the alleged discrimination and to institute corrective measures on the  
 15 recipient’s behalf has actual knowledge of discrimination in the recipient’s programs” and  
 16 responds with “deliberate indifference.” *Gebser*, 524 U.S. at 290.

17 Recently, in *Karasek v. Regents of University of California*, 956 F.3d 1093 (9th Cir. 2020),  
 18 the Ninth Circuit listed the elements of a Title IX claim arising from student-on-student or faculty-  
 19 on-student sexual harassment or assault.<sup>8</sup> To state a *post*-harassment/assault claim—based on an  
 20 educational institution’s deliberate indifference to a plaintiff’s experience of sexual harassment or  
 21 assault—the plaintiff must allege the following:

22 First, the school must have “exercise[d] substantial control over both the harasser  
 23 and the context in which the known harassment occur[red].” *Davis*, 526 U.S. at 645.  
 24 Second, the plaintiff must have suffered harassment “that is so severe, pervasive, and  
 25 objectively offensive that it can be said to deprive the [plaintiff] of access to the  
 26 educational opportunities or benefits provided by the school.” *Id.* at 650. Third, a  
 27 school official with “authority to address the alleged discrimination and to institute  
 28 corrective measures on the [school’s] behalf” must have had “actual knowledge” of

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<sup>8</sup> *Karasek* clarified that these elements are “in addition to the threshold requirements that the defendant be a recipient of ‘[f]ederal financial assistance’ and that the plaintiff experienced sex discrimination.” 956 F.3d at 1105 n.1.

the harassment. *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 739 (9th Cir. 2000); *see Davis*, 526 U.S. at 650. Fourth, the school must have acted with “deliberate indifference” to the harassment, such that the school’s “response to the harassment or lack thereof [was] clearly unreasonable in light of the known circumstances.” *Davis*, 526 U.S. at 648. . . . And fifth, the school’s deliberate indifference must have “subject[ed the plaintiff] to harassment.” *Id.* at 644. Put differently, the school must have “cause[d the plaintiff] to undergo harassment or ma[d]e [the plaintiff] liable or vulnerable to it.” *Id.* at 645 (internal quotation marks omitted).

*Karasek*, 956 F.3d at 1105.<sup>9</sup> Meanwhile, to state a *pre*-harassment/assault claim—based on an educational institution’s conduct prior to a plaintiff’s experience of sexual harassment or assault—the plaintiff may allege:

(1) a school maintained a policy of deliberate indifference to reports of sexual misconduct, (2) which created a heightened risk of sexual harassment that was known or obvious (3) in a context subject to the school's control, and (4) as a result, the plaintiff suffered harassment that was "so severe, pervasive, and objectively offensive that it can be said to [have] deprive[d] the [plaintiff] of access to the educational opportunities or benefits provided by the school."

*Id.* at 1112 (quoting *Davis*, 526 U.S. at 650). Because a pre-harassment/assault claim is based on the theory that a school has intentionally violated Title IX by maintaining a policy that discriminates on the basis of sex—such as a policy of deliberate indifference to past reports of sexual misconduct<sup>10</sup>—a plaintiff is not required to allege that the school had actual knowledge that the plaintiff experienced sexual harassment or assault or that the school responded with deliberate indifference to the plaintiff’s experience of sexual harassment or assault. *Id.* at 1112–13.

Because the Second Amended Complaint includes allegations about UCSF's conduct both before and after Plaintiff's alleged experience of sexual harassment and assault, the Court considers whether Claim One fails to state claim under both the pre- and the post-harassment/assault theories of Title IX liability.

<sup>9</sup> Some courts have referred to *Karasek*'s fourth and fifth elements as a single element. Following *Karasek*, this Court refers to the requirement that the school responded with deliberate indifference as the “fourth element” and to the requirement that the deliberate indifference caused the plaintiff to experience harassment or assault or made them vulnerable to such as the “fifth element.”

<sup>10</sup> Karasek held that a school's "deliberate indifference to reports of past sexual misconduct" satisfies the first element, but also suggested that other "form[s] of pre-assault conduct" may do so as well. Karasek, 956 F.3d at 1112 n.5.

**2. Whether Claim One Fails to State a Post-Harassment/Assault Title IX Claim**

In their present motion, the Regents argue that Plaintiff's post-harassment/assault Title IX claim fails because he has not adequately alleged (1) the fourth element that UCSF acted with deliberate indifference and (2) the fifth element that UCSF's alleged deliberate indifference caused him to experience further sexual harassment or assault or made him vulnerable to such. *See Regents Mot. at 2, 6–10; Regents Reply at 1–4.* According to the Regents, Plaintiff acknowledges that, following his report of sexual misconduct, UCSF: (1) promptly removed Plaintiff from Dr. Kapla's clinic; (2) removed Dr. Kapla from his Volunteer Clinical Faculty position; (3) placed Plaintiff in a new family medicine clerkship—although Plaintiff was unable complete this clerkship due to his PTSD; (4) assigned Plaintiff a CARE advocate; and (5) gave Plaintiff access to “free therapy (despite his disagreement with his therapist).” *Regents Mot. at 8; see id. 1–8 & n.1; see also SAC ¶¶ 14, 20, 23–24, 30, 32, 36, 49, 52.* Consequently, the Regents, citing *Karasek*, 956 F.3d 1093, and *Oden v. Northern Marianas College*, 440 F.3d 1085 (9th Cir. 2006), contend that Plaintiff has not and cannot plausibly allege that UCSF's response was deliberately indifferent. *See Regents Mot. at 6–8.* Additionally, because Dr. Kapla “worked in a community-based clinic, which was not located on campus,” and because Plaintiff “does not allege that he had any further interaction with Dr. Kapla . . . or that he ever saw him on campus,” the Regents argue that any failure to implement protective measures does not amount to deliberate indifference. *Id.* at 9; *see id.* at 4, 8–9. Finally, the Regents claim that Plaintiff has not alleged that he experienced or was made vulnerable to further sexual harassment or assault—“the only harms are actionable under Title IX.” *Id.* at 10; *see id.* at 9–10.

In his opposition, Plaintiff recognizes that Dean Jones “arranged to have Plaintiff leave the Kapla Clinic even before the matter was reported to the Title IX Officer on campus,” *Opp'n to Regents Mot. at 7*, and that he had no further contact with Dr. Kapla, *id.* at 6. Nevertheless, he asks this Court to follow *Fitzgerald v. Barnstable School Committee*, 504 F.3d 165 (1st Cir. 2007), *rev'd on other grounds*, 555 U.S. 246 (2009), and *Williams v. Board of Regents of University System of Georgia*, 477 F.3d 1282 (11th Cir. 2007), and conclude that Plaintiff remained vulnerable to further harassment and assault, even though he never actually experienced further

1 sexual harassment or assault by Dr. Kapla. *Id.* at 3–6. Citing six cases, Plaintiff also claims that  
 2 courts frequently have refused to grant motions to dismiss on “similar” facts. *Id.* at 6–7 (citing  
 3 cases). Notably, in *Takla v. Regents of the University of California*, No. 2:15-cv-04418-  
 4 CAS(SHx), 2015 WL 6755190, at \*6 (C.D. Cal. Nov. 2, 2015), the court found it “premature” to  
 5 dismiss the plaintiff’s post-harassment Title IX claim because the allegations could amount to  
 6 deliberate indifference when “taken together,” even if they could not do so when “taken  
 7 individually.” *Id.* at 7. Lastly, Plaintiff contends that Dr. Comelli’s remarks themselves constitute  
 8 “further sexual harassment.”<sup>11</sup> *Id.* at 1, 8.

9 In their reply, the Regents argue that Plaintiff’s reliance on *Fitzgerald* is misplaced,  
 10 because the First Circuit affirmed the district court’s grant of summary judgment to the defendant  
 11 school committee on deliberate indifference grounds, and because the Supreme Court later  
 12 “overruled” the First Circuit’s decision. Regents Reply at 3 (citations omitted). Additionally, the  
 13 Regents contend that *Williams* does “not stand for the proposition that Plaintiff asserts,” because  
 14 that decision focused on “pre-harassment conduct, not just post-harassment vulnerability,” and  
 15 because the Eleventh Circuit noted that “‘the facts alleged . . . [were] extreme.’” *Id.* at 4 (quoting  
 16 *Williams*, 477 F.3d at 1299). In response to Plaintiff’s arguments regarding Dr. Comelli, the  
 17 Regents claim that Plaintiff fails to allege that Dr. Comelli “subjected him to or made him more  
 18 vulnerable to sexual harassment or assault.” *Id.* at 4 (citations omitted). Although Plaintiff alleges  
 19 “a laundry list of harms,” the Regents argue, these harms are “different” from those required to  
 20 satisfy the fifth element of a post-harassment/assault Title IX claim. *Id.*

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 23       <sup>11</sup> In his opposition to the Regents’ motion, Plaintiff argues that Dr. Comelli had a conflict of  
 24 interest because he was a colleague of Dr. Kapla and that he therefore violated the American  
 25 Mental Health Counselors Association Code of Ethics and the California Constitution by treating  
 26 Plaintiff without a conflict waiver. Opp’n to Regents Mot. at 8. Relatedly, Plaintiff requests  
 27 judicial notice of (1) the American Mental Health Counselors Association Code of Ethics and  
 28 (2) Article I, Section 28 of the California Constitution. *See* Req. for Judicial Notice (dkt. 44). The  
 Court takes judicial notice of the existence of these materials, but it does not draw inferences from  
 them, nor does it take notice of facts that might reasonably be disputed. *See United States v.*  
*Corinthian Colls.*, 655 F.3d 984, 998–99 (9th Cir. 2011) (at the motion to dismiss stage, taking  
 judicial notice of the existence of documents but not “draw[ing] inferences [therefrom] or tak[ing]  
 notice of facts that might reasonably be disputed”).

i. Whether Plaintiff has Adequately Alleged Deliberate Indifference

Deliberate indifference “is a fairly high standard—a ‘negligent, lazy, or careless’ response will not suffice.” *Karasek*, 956 F.3d at 1105 (quoting *Oden*, 440 F.3d at 1089). Instead, a plaintiff “must demonstrate that the school’s actions amounted to ‘ ‘an official decision . . . not to remedy’ ’ the discrimination.” *Id.* (quoting *Oden*, 440 F.3d at 1089 (citation omitted)). In other words, “ ‘the recipient must merely respond . . . in a manner that is not clearly unreasonable.’ ” *Id.* (quoting *Davis*, 526 U.S. at 649). “Absent an unreasonable response, [courts] cannot ‘second-guess[ ] the disciplinary decisions made by school administrators.’ ” *Id.* (quoting *Davis*, 526 U.S. at 648). And “the reasonableness of the response depends on the educational setting involved—what would be unreasonable in the context of an elementary school might not be unreasonable in the context of a university.” *Id.* (citing *Davis*, 526 U.S. at 649). Accordingly, the Supreme Court “has emphasized that Title IX ‘does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action.’ ” *Id.* (citing *Davis*, 526 U.S. at 648).

“Generally, deliberate indifference is a fact-intensive inquiry and is often a question for the jury’s determination.” *Lilah R. ex rel. Elena A. v. Smith*, No. 11-01860 MEJ, 2011 WL 2976805, at \*5 (N.D. Cal. Jul. 22, 2011) (citations omitted). “[I]n an appropriate case,” however, “there is no reason why courts, on a motion to dismiss, for summary judgment, or for a directed verdict, could not identify a response as not ‘clearly unreasonable’ as a matter of law.” *Id.* (quoting *Davis*, 526 U.S. at 649).

**a. UCSF’s Alleged Failures in Handling Plaintiff’s Report, Disciplining Dr. Kapla, and Taking Steps to Protect Plaintiff**

The Court begins by considering Plaintiff’s allegations that UCSF mishandled his report of sexual misconduct, including by violating the University of California’s “sexual violence and sexual harassment” policies and the U.S. Department of Education’s Title IX guidance provided in its “Dear Colleague Letter” and its “Questions and Answers on Campus Sexual Misconduct” that replaced the Dear Colleague Letter on September 22, 2017. *See* SAC ¶¶ 13–15, 17–18, 24, 37, 42–43, 52–53. In this section, the Court also considers Plaintiff’s allegation that UCSF failed to

1 “appropriately discipline or sanction Dr. Kapla,” *id.* ¶ 40; *see id.* ¶ 42, and his related allegation  
2 that he “avoid[ed] enrollment or participation in . . . activities [for gay students] on campus for  
3 fear of seeing Dr. Kapla,” *id.* ¶ 43.

4 Although Plaintiff has not identified the specific provisions that UCSF allegedly violated,  
5 he has alleged that UCSF failed to conduct its investigation with “clarity, fairness, or timeliness”  
6 and to give him “periodic update[s] on the complaint process.” *Id.* ¶ 43; *see id.* ¶¶ 3, 48. Based on  
7 these and Plaintiff’s other allegations, the Court identifies the alleged policy provisions that appear  
8 most relevant. First, the Dear Colleague Letter allegedly stated that schools must “take immediate  
9 action” to “address a complaint of sexual harassment/assault,” “prevent its reoccurrence,” “protect  
10 the complainant,” and “notify the complainant of his or her options to avoid contact with the  
11 alleged perpetrator.” *Id.* ¶ 13. Further, schools must give the parties to a complaint “periodic  
12 status updates” and “an equal opportunity to present relevant witnesses and other evidence.” *Id.*  
13 Second, the “Questions and Answers on Campus Sexual Misconduct” allegedly provides that the  
14 school must “make findings of fact and conclusions as to whether the facts support a finding of  
15 responsibility for violation of the school’s sexual misconduct policy”; “offer each party the same  
16 meaningful access to any information that will be used during informal and formal disciplinary  
17 meetings and hearings, including the investigation report”; give the parties an “opportunity to  
18 respond to the report in writing in advance of the decision of responsibility”; and “provide written  
19 notice of the outcome of disciplinary proceedings to the reporting and responding parties  
20 concurrently.” *Id.* ¶ 15. Additionally, “[i]t may be appropriate for a school to take interim  
21 measures,” such as “campus escort services, restrictions on contact between the parties, changes in  
22 work or housing locations, leaves of absence, [and] increased security and monitoring of certain  
23 areas of campus.” *Id.* Third, the Plaintiff alleges that UCSF’s CARE Advocacy Resources and  
24 Evaluation website provides in part:

25 Under the UC Sexual Violence and Sexual Harassment Policy (SVSH Policy), the  
26 campus Title IX office conducts a fair, thorough and impartial investigation to  
27 determine if the SVSH Policy was violated. Both the person who filed the complaint  
28 (complainant) and the person responding to allegations (respondent) are notified of  
the investigation’s findings and have the opportunity to submit a response.

1 *Id.* ¶ 37. Also, the University of California’s “sexual violence and sexual harassment policies,”  
2 effective January 1, 2016, allegedly provide that the Title IX Officer “shall make an immediate  
3 assessment concerning the health and safety of the individual and the campus community,  
4 implement temporary remedies immediately necessary (including no contact orders), and provide  
5 to the Complainant a written explanation of rights and reporting options . . . and available campus  
6 and community resources.” *Id.* ¶ 17. Lastly, these policies have several additional requirements  
7 for involving and notifying the parties in “formal investigations.” *Id.*

8 Given its relevance and binding authority, *Karasek*, 956 F.3d 1093, guides the Court’s  
9 analysis. In that case, two of the plaintiffs, Ms. Karasek and Ms. Commins, brought pre- and post-  
10 assault Title IX claims against the Regents after allegedly being sexually assaulted by other  
11 students at the University of California, Berkeley. In support of their post-assault claims, the  
12 plaintiffs alleged that the university responded to their reports of sexual assault with deliberate  
13 indifference (1) by unjustifiably delaying its investigations; (2) by failing to communicate with the  
14 plaintiffs and to afford them opportunities to participate in the investigations, in violation of the  
15 university’s policies and the U.S. Department of Education’s Title IX guidance; and (3) by failing  
16 to take adequate steps to protect the plaintiffs from their assailants after they had reported the  
17 sexual assaults. *Id.* at 1106, 1109. The district court held that the plaintiffs failed to adequately  
18 allege deliberate indifference, and the Ninth Circuit affirmed. *Id.* at 1106.

19 Specifically, Ms. Karasek alleged that she was sexually assaulted by another member of a  
20 student club in February 2012; that a university official was informed of her assault the same  
21 month; that she “formally reported” her assault in April 2012; that she submitted a written report  
22 in May 2012; and that she met with a university official in November 2012 to “voice her  
23 concerns” that the university “was not timely handling her complaint” because she “had received  
24 no communications” from the university since filing her written statement in May. *Id.* at 1099–  
25 1100. In December 2012, after Ms. Karasek “sent several more e-mails,” the university responded  
26 with two e-mails: the first informed her that the matter had been informally resolved, but did not  
27 describe the outcome; the second informed her that her assailant had violated the “Code of Student  
28 Conduct,” but did not describe any disciplinary actions. *Id.* at 1101. In October 2012, Plaintiff’s

1 assailant had “accepted responsibility” for violating the Code of Student Code and received  
2 sanctions in the form of disciplinary probation, one consultation with a mental health practitioner,  
3 and one meeting with an alcohol and other drugs counselor, but Ms. Karasek did not learn of these  
4 sanctions until September 2013—nearly a year later. *Id.* at 1100–01.

5 Meanwhile, Ms. Commins alleged that she was sexually assaulted in January 2012 and that  
6 she reported the assault to the university the following day and to the university’s police  
7 department soon thereafter. *Id.* at 1101. On January 31, 2012, the University placed her assailant  
8 on “interim suspension, prohibiting him from entering campus.” *Id.* In February 2012, Ms.  
9 Commins submitted an incident report, but the university informed Ms. Commins that it would not  
10 conduct its own investigation until the police had finished theirs. *Id.* After Ms. Commins’s  
11 assailant was convicted of felony assault in October 2012, the university informed Ms. Commins  
12 that it would hold a formal hearing, but no such hearing was held. *Id.* In the spring of 2013, the  
13 university informed Ms. Commins that her assailant had violated the university’s “Policy on  
14 Sexual Harassment.” *Id.* After Ms. Commins expressed her preference that her assailant be  
15 expelled, the university told her that her expulsion was not possible; so, she reluctantly agreed to  
16 his suspension until her graduation. *Id.* Her assailant was also excluded from campus, prohibited  
17 from contacting her, placed on permanent disciplinary probation, and required to complete a  
18 reflective writing assignment. *Id.* But because the university sent an e-mail to an incorrect  
19 address, Ms. Commins did not learn of these sanctions until she requested an update four months  
20 later. *Id.* at 1102. After Ms. Commins was accepted into one of the university’s graduate  
21 programs, she requested that her assailant’s suspension be extended while she pursued graduate  
22 studies. *Id.* The university denied her request, but the no-contact order remained in place, and  
23 Ms. Commins’s did not allege that she saw her assailant again. *Id.*

24 First, *Karasek* explained that a school’s “delayed response constitutes deliberate  
25 indifference if it prejudices the plaintiff or if the delay was a ‘deliberate attempt to sabotage [the  
26 p]laintiff’s complaint or its orderly resolution.’ ” *Id.* at 1106 (quoting *Oden*, 440 F.3d at 1089)  
27 (alteration in original). The court concluded that neither the eight-and-a-half-month delay in  
28 resolving Ms. Karasek’s case nor the thirteen-month delay in resolving Ms. Commins’s case

1 constituted deliberate indifference, given the university’s interim actions. *Id.* at 1106–07, 1109–  
2 10. In Ms. Karasek’s case, the university met with the student club’s president, met with Ms.  
3 Karasek’s assailant, and issued several “Administrative Disposition Letters” informing her  
4 assailant that he had violated the Student Code of Conduct and proposing sanctions. *Id.* at 1106.  
5 In Ms. Commins’s case, the university placed her assailant on interim suspension and barred him  
6 from campus. *Id.* at 1109.

7 On the one hand, *Karasek* analogized the plaintiffs’ cases to *Oden*, 440 F.3d 1085, where  
8 the Ninth Circuit held that a nine-month delay before holding a formal hearing in the plaintiff’s  
9 case did not constitute deliberate indifference, because the college “began to act as soon as it  
10 became aware of Plaintiff’s allegations” that her music teacher was sexually harassing and  
11 assaulting her, and because there was “no evidence in the record that the delay prejudiced [the  
12 plaintiff].” *Oden*, 440 F.3d at 1089; *see Karasek*, 956 F.3d at 1106–07, 1109–10. In *Oden*, the  
13 college assigned the plaintiff two counselors who met with her more than a dozen times, assisted  
14 her in filing a formal complaint, and helped her drop a class with the assailant. *Oden*, 440 F.3d at  
15 1089. Additionally, the college instructed the assailant not to contact the plaintiff and, after the  
16 hearing took place, “significantly disciplined” him by suspending him without pay for four weeks,  
17 denying him a raise for one year, prohibiting him from engaging in one-on-one instruction for two  
18 years, putting him on probation for five years, and placing a letter of reprimand in his personnel  
19 file. *Id.*; *see id.* at 1087–88.

20 On the other hand, *Karasek* distinguished *Williams*, 477 F.3d 1282, one of the cases relied  
21 on by Plaintiff. *See Karasek*, 956 F.3d at 1106–07, 1109–10; Opp’n to Regents Mot. at 4–6. In  
22 *Williams*, the University of Georgia did not hold a disciplinary hearing for eleven months after the  
23 plaintiff reported that she had been gang-raped by members of the basketball team, despite a  
24 comprehensive report by the university’s police department “within a few months of the assault”  
25 that largely corroborated the plaintiff’s allegations. *Karasek*, 956 F.3d at 1106 (citing *Williams*,  
26 477 F.3d at 1296–97). *Karasek* explained that in *Williams*, the “level of indifference [was] far  
27 more extreme” and clearly prejudiced the plaintiff because “several of the plaintiff’s assailants no  
28 longer attended the university” by the time the hearing was held. *Id.* (citing *Williams*, 477 F.3d at

1 1296). Meanwhile, in *Karasek*, the court concluded that the delays were not clearly unreasonable  
2 and did not prejudice the plaintiffs. *Id.* at 1107, 1109–10.

3 Second, *Karasek* explained, “Ordinarily, a school’s ‘failure to comply with [U.S.  
4 Department of Education] regulations . . . does not establish . . . deliberate indifference.’ The  
5 same is true of a school’s violations of its own policies.” *Id.* at 1107 (quoting *Gebser*, 524 U.S. at  
6 291–92, and citing *Oden*, 440 F.3d at 1089). The court recognized that the university’s alleged  
7 conduct “was inconsistent” with both the U.S. Department of Education’s Dear Colleague Letter  
8 and its own policies because it had not afforded the plaintiffs “an equal opportunity to present  
9 relevant witnesses and other evidence,” given them “periodic status updates,” promptly notified  
10 them “about the outcome of both the complaint and any appeal,” resolved their sexual-assault  
11 complaints within 60 days, or consulted with them before resolving their cases informally. *Id.* at  
12 1107; *see id.* at 1107–10. Nevertheless, the university’s noncompliance did not constitute  
13 deliberate indifference in Ms. Karasek’s case because it had investigated her complaint, met with  
14 her assailant, and eventually imposed arguably appropriate sanctions, and in Ms. Commins’s case  
15 because it had placed her assailant on interim suspension and barred him from campus. *Id.* at  
16 1107–10. Along the same lines, the court noted that, while the university’s “lack of  
17 communication” with Ms. Karasek was “inexcusable,” it did not amount to deliberate indifference  
18 because the university “acted on [her] complaint and imposed arguably appropriate sanctions on  
19 [her assailant].” *Id.* at 1109. Similarly, the court described the university’s “general lack of  
20 communication” with Ms. Commins as “likely a significant failing,” its decision to resolve her  
21 complaint “informally without allowing [her] to testify or present evidence” as “troubling,” and its  
22 decisions not to expel her assailant and not to extend his suspension while she pursued graduate  
23 studies as questionable. *Id.* at 1110. Nevertheless, the court reasoned that these decisions were  
24 not deliberately indifferent because the university also “moved quickly to suspend her assailant”  
25 and “imposed fairly stringent sanctions upon resolution of [her] complaint.” *Id.*

26 Third, *Karasek* concluded that the university’s alleged failures to take adequate steps to  
27 protect the plaintiffs from their assailants were insufficient to support deliberate indifference. *Id.*  
28 at 1108–09, 1110. Although the university was “aware that multiple women reported being

1 sexually assaulted” by Ms. Karasek’s assailant, the court reasoned that the university’s failure to  
2 take any measures to protect her was not clearly unreasonable given that there was “no indication”  
3 that Ms. Karasek had informed the University that she “regularly saw” her assailant and the  
4 university therefore “had no reason to know that preventative measures were necessary to protect  
5 [her] from future harassment,” and given that Ms. Karasek never interacted with her assailant  
6 again, “aside from seeing him from afar on one occasion.” *Id.* at 1108, 1109. Additionally,  
7 because the university had issued an interim suspension of Ms. Commins’s assailant “within two  
8 weeks” of her report of sexual assault and a no-contact order as part of its final sanctions, and  
9 because Ms. Commins did not allege these protective measures were “ineffective” or that she ever  
10 saw her assailant again, the university’s actions to protect Ms. Commins did not constitute  
11 deliberate indifference. *Id.* at 1110.

12 The Court observes that, aside from interviewing Plaintiff on October 23, 2017, it is  
13 unclear what steps UCSF took to investigate the alleged sexual misconduct after Dr. Comelli  
14 reported it to Dean Jones in August 2017 and before UCSF closed Plaintiff’s case on July 24,  
15 2018. *See SAC ¶¶ 24, 41.* It is also unclear whether UCSF’s investigation ever reached a  
16 conclusion as to whether Dr. Kapla violated the sexual misconduct policy or whether it simply  
17 determined that it “did not have jurisdiction” over Dr. Kapla (as Ms. LaCampagne had been  
18 concerned). *Id. ¶ 34.* As it appears in the operative complaint, Ms. LaCampagne’s October 18,  
19 2018 e-mail does not reference any factual findings, conclusions, disciplinary actions, or options  
20 to respond or appeal. *Id. ¶ 41.* So, even though Plaintiff alleges that UCSF promptly removed  
21 him from Dr. Kapla’s clinic, it is not clear when UCSF removed Dr. Kapla from his position as a  
22 Volunteer Clinical Faculty member and whether they ever informed Plaintiff that they had done  
23 so. *See id. ¶ 20* (“*Records obtained from UCSF confirm that UCSF would notify Dr. Kapla that he*  
24 [*was*] *no longer a volunteer due to a ‘severe’ complaint of sexual harassment against him.*”)  
25 (italics added). That said, Plaintiff acknowledges that Dean Jones promptly removed him from  
26 Dr. Kapla’s clinic, that Ms. LaCampagne interviewed him and referred him to Ms. Caramagno,  
27 that Ms. Caramagno referred him to the CARE Advocacy Resources and Education website, and  
28 that (at least according to the website) Ms. Caramagno and the CARE Advocate Office were

1 available if Plaintiff needed support or services during the investigation and adjudication process.  
2 *Id.* ¶¶ 14, 20, 24, 31, 35–37, 49, 52. Consequently, Plaintiff’s allegations that UCSF mishandled  
3 his report of sexual misconduct, inadequately disciplined Dr. Kapla, and took inadequate steps to  
4 protect him from Dr. Kapla are insufficient to demonstrate that UCSF responded with deliberate  
5 indifference.

6 First, Plaintiff alleges that UCSF failed to conduct its investigation into his report with  
7 “timeliness.” *Id.* ¶ 43. Although the fourteen-month delay in resolving Plaintiff’s complaint and  
8 notifying him that his case had been closed appears unjustified, similar delays in *Karasek* did not  
9 amount to deliberate indifference, given the university’s interim actions and that the plaintiffs had  
10 not alleged that they were prejudiced by the delays. *Karasek*, 956 F.3d at 1106, 1109–10. In light  
11 of UCSF’s actions and the lack of alleged prejudice to Plaintiff, the same conclusion follows  
12 here.<sup>12</sup>

13 Second, UCSF’s alleged failure to keep Plaintiff apprised of the status of his case while it  
14 was pending and its subsequent failure to inform Plaintiff of the results of its investigation—likely  
15 in violation of the University of California’s policies and the U.S. Department of Education’s Title  
16 IX guidance—are, in a word, “inexcusable.” *Id.* at 1109. In *Karasek*, however, the university  
17 failed to provide Ms. Karasek with any updates for the several months and only contacted her after  
18 it had reached its conclusion, and the university failed to inform either Ms. Karasek or Ms.  
19 Commins of the disciplinary actions taken against the respondents until long after their cases had  
20 been closed. *See id.* at 1101, 1102. Nevertheless, the Ninth Circuit concluded that the university’s  
21 responses did not constitute deliberate indifference because the university “acted on [Ms.  
22 Karasek’s] complaint and imposed arguably appropriate sanctions on [her assailant]” and “moved  
23 quickly to suspend [Ms. Commins’s] assailant, and . . . imposed fairly stringent sanctions upon  
24 resolution of [her] complaint.” *Id.* at 1109, 1110. Here, UCSF promptly removed Plaintiff from  
25 Dr. Kapla’s clinic, removed Dr. Kapla from his position as a Volunteer Clinical Faculty member,  
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<sup>12</sup> In its equitable tolling analysis, the Court considers Plaintiff’s alleged reliance on UCSF officials’ statements that he need not retain a lawyer while UCSF conducted its investigation. *See infra* Section III.C.2.c.; *see also* SAC ¶¶ 34–39, 46–47, 49.

1 interviewed Plaintiff, and assigned him a CARE Advocate. Further, Plaintiff has not alleged that  
2 he ever requested an update on case—unlike Ms. Karasek, who repeatedly reached out to the  
3 university. *See id.* at 1100. Thus, Plaintiff’s allegations in this regard do not amount to deliberate  
4 indifference.

5 Third, Plaintiff has alleged that UCSF failed to “appropriately discipline or sanction Dr.  
6 Kapla.” SAC ¶ 40; *see id.* ¶ 42. In *Karasek*, the plaintiffs’ challenged the university’s decisions  
7 to allow Ms. Karasek’s assailant to attend the university’s summer program while its investigation  
8 was pending and to not expel Ms. Commins’s assailant or extend his suspension while she pursued  
9 graduate studies at the university. *Karasek*, 956 F.3d at 1109, 1110. The Ninth Circuit concluded  
10 that these decisions did not demonstrate deliberate indifference because the university imposed  
11 “arguably appropriate sanctions” on Ms. Karasek’s assailant and “fairly stringent sanctions” on  
12 Ms. Commins’s assailant. *Id.* at 1109, 1110. Again, the same conclusion follows here; Plaintiff  
13 acknowledges that Dr. Kapla was removed from his position as a Volunteer Clinical Faculty  
14 member, *see* SAC ¶ 20, and he fails to identify alternative or additional disciplinary actions that  
15 would have been more appropriate. *See Karasek*, 956 F.3d. at 1105 (quoting *Davis*, 526 U.S. at  
16 648) (“Absent an unreasonable response, [courts] cannot ‘second-guess[ ] the disciplinary  
17 decisions made by school administrators.’ ”). Even if he had, “[a]n aggrieved party is not  
18 entitled to the precise remedy that he or she would prefer.” *Id.* at 1109 (quoting *Oden*, 440 F.3d  
19 at 1089).

20 Plaintiff also alleges that he “avoid[ed] enrollment or participation in . . . activities [for gay  
21 students] on campus for fear of seeing Dr. Kapla.” SAC ¶ 43. Analogously, Ms. Karasek alleged  
22 that the university’s failure to take any actions to protect her from her assailant after she reported  
23 the assault was clearly unreasonable, especially given that the university “was aware that multiple  
24 women reported being sexually assaulted by him.” *Karasek*, 956 F.3d at 1108. The Ninth Circuit  
25 disagreed because there was “no indication” that Ms. Karasek ever informed the university that  
26 she regularly encountered her assailant and, after she reported the assault, she only saw him once  
27 “from afar.” *Id.* at 1109. Similarly, in the Second Amended Complaint, there is no indication that  
28 Plaintiff ever informed UCSF that he had encountered Dr. Kapla outside of his clerkship, and

1 Plaintiff recognizes that he never encountered Dr. Kapla after he was removed from his clinic. *See*  
2 Opp'n to Regents Mot. at 6. UCSF therefore "had no reason to know that [additional]  
3 preventative measures were necessary to protect Plaintiff from future harassment [or assault],"  
4 *Karasek*, 956 F.3d at 1109, and the present case is indistinguishable from *Karasek*.

5 **b. UCSF's Alleged Failure to Provide Plaintiff with Adequate Support  
6 and Services**

7 The Court next considers Plaintiff's allegations that UCSF failed to provide him with  
8 adequate support and services. First, Plaintiff alleges that UCSF failed to ensure that Plaintiff's  
9 experience of sexual harassment and assault did not cause "potential academic defects in his  
10 record" by failing to assist him in finding a second alternate family medicine clerkship and/or in  
11 "preparing a statement of what occurred at the Kapla Clinic to explain his incomplete grade and  
12 his PTSD symptoms." SAC ¶ 42; *see id.* ¶¶ 32–33, 43, 49. Second, Plaintiff alleges that Dr.  
13 Comelli's accusations that Plaintiff "invited" the alleged sexual misconduct constitute deliberate  
14 indifference. *Id.* ¶¶ 40, 42–43; *see id.* ¶¶ 38–39, 47, 52. Third, Plaintiff alleges that UCSF acted  
15 with deliberate indifference by failing to "help[] him deal with the negative effects" of the alleged  
16 sexual misconduct, *id.* ¶ 49, and by failing to pay for private therapy after Dr. Comelli's  
17 accusations, *id.* ¶ 43. Relatedly, the Dear Colleague Letter allegedly stated that a school "must  
18 take immediate action" to "address" the effects of sexual harassment/assault and that remedies  
19 may include "tutoring," "[t]uition reimbursement," and "[r]eimbursement for psychological  
20 counseling." *Id.* ¶ 13. Also, the "Questions and Answers on Campus Sexual Misconduct"  
21 allegedly provides that "[i]t may be appropriate for a school to take interim measures," such as  
22 "counseling, extensions of time or other course-related adjustments, [and] modifications of work  
23 or class schedules." *Id.* ¶ 15. Further, "The measures needed by each student may change over  
24 time, and the Title IX Coordinator should communicate with each student throughout the  
25 investigation to ensure that any interim measures are necessary and effective based on the  
26 students' evolving needs." *Id.*

27 Despite UCSF's alleged failure to provide adequate support and services, Plaintiff  
28 acknowledges that it did make some accommodations—Plaintiff was assigned to an alternate

1 family medicine clerkship and took a reduced course load during the spring semester—and it did  
2 provide him with some services—Plaintiff was assigned a CARE advocate and provided free  
3 therapy with Dr. Comelli. *Id.* ¶¶ 23, 32, 35–38, 43. Additionally, while Plaintiff alleges that  
4 UCSF failed to “help[] him deal with the negative effects” of the alleged sexual misconduct, *id.*  
5 ¶ 49, he has not alleged that he ever requested any additional or alternative support or services—  
6 such as assistance in finding a second alternate family medicine clerkship, assistance in curing his  
7 incomplete grade for the family medicine rotation, a new therapist, or reimbursement for private  
8 therapy. Lastly, although Dr. Comelli’s alleged remarks are offensive, unprofessional, and  
9 unreasonable, Plaintiff has not alleged that Dr. Comelli had any control over UCSF’s response to  
10 Plaintiff’s report of sexual misconduct; that Ms. LaCampagne, Ms. Caramagno, or any other  
11 UCSF officials were aware of the incident; or that any UCSF officials had any reason to anticipate  
12 that Dr. Comelli—who began treating Plaintiff before his clerkship with Dr. Kapla and who  
13 initially reported Dr. Kapla’s alleged sexual misconduct—would make such statements.  
14 Consequently, even when UCSF’s alleged failures are taken together with Dr. Comelli’s alleged  
15 outburst, they do not demonstrate a deliberately indifferent response in light of the  
16 accommodations and services provided to Plaintiff. *See Stiles ex rel. D.S. v. Grainger Cty.*, 819  
17 F.3d 834, 849 (6th Cir. 2016) (“Plaintiffs’ allegations that Defendants made rude or critical  
18 comments, offered unhelpful suggestions, and acted disrespectfully do not undercut the  
19 reasonableness of Defendants’ concrete actions taken in response to Plaintiffs’ complaints.”); *D.V.*  
20 *ex rel. B.V. v. Pennsauken Sch. Dist.*, 247 F.Supp.3d 464, 475 (D.N.J. 2017) (school psychiatrist’s  
21 offensive comments did not constitute deliberate indifference where the District “reasonably  
22 addressed the one reported sexual orientation/bullying incident,” where the psychiatrist played no  
23 part in the relevant investigation, and where there was no indication her attitude “pervaded the  
24 [school] District”).

25 **c. Plaintiff has not Adequately Alleged Deliberate Indifference**

26 Although UCSF’s alleged response was deficient in many respects, it was not “clearly  
27 unreasonable in light of the known circumstances,” *Davis*, 526 U.S. at 648, such that it amounted  
28 to “an official decision . . . not to remedy” the sexual misconduct, *Gebser*, 524 U.S. at 290.

1 Consequently, to the extent Claim One alleges a post-harassment/assault Title IX claim, it must be  
2 dismissed for failure to state a claim.

3 **ii. Whether Plaintiff has Adequately Alleged that the UCSF's Alleged Deliberate  
4 Indifference Subjected Him to Further Sexual Harassment/Assault, Made Him  
5 Vulnerable to Such, or Otherwise Subjected Him to Sex Discrimination**

6 In its prior order, the Court concluded that Plaintiff had failed to adequately allege the fifth  
7 element because he had not alleged that UCSF's deliberate indifference "a) caused him to  
8 experience any sexual harassment and assault, b) made him vulnerable to sexual harassment and  
9 assault, or c) otherwise subjected him to sex discrimination in violation of Title IX." Order at 19.  
10 As noted above, the Regents seek dismissal of the Second Amended Complaint on the same  
11 grounds. *See* Regents Mot. at 2, 8–10; Regents Reply at 1–4. Although Plaintiff has failed to  
12 adequately allege the fourth element, the Court also considers whether his allegations are  
13 sufficient to satisfy the fifth element.

14 Previously, the Court observed that several courts have concluded that "a plaintiff who has  
15 withdrawn from an educational institution or opportunities offered by the institution due to a  
16 reasonable concern of encountering his or her harasser or assaulter can adequately allege the fifth  
17 element when the educational institution has failed to take adequate steps to protect the plaintiff."  
18 Order at 18–19 n.20 (citations omitted). There, the Court cited *Farmer v. Kansas State University*,  
19 918 F.3d 1094, 1104–05 (10th Cir. 2019), where the plaintiffs withdrew from various education  
20 opportunities after being raped by other students due to their concerns of encountering them;  
21 *Williams*, 477 F.3d at 1295–97, where the plaintiff withdrew from the university after being raped  
22 by other students due to her concern of encountering them; and *Takla*, No. 2:15-cv-04418 (CAS-  
23 SHx), 2015 WL 6755190, at \*4–5 (C.D. Cal. Nov. 2, 2015), where the plaintiff did not "set[] foot  
24 on the [university's] campus" after being sexually harassed by a professor due to her concern of  
25 encountering him. *See id.* In the First Amended Complaint, however, Plaintiff had not alleged  
26 "that he was concerned that he would encounter Dr. Kapla or that UCSF failed to take adequate  
27 steps to protect him from Dr. Kapla *after* UCSF had actual knowledge of Plaintiff's alleged  
28 experience of sexual misconduct." *Id.*

1       In the Second Amended Complaint, Plaintiff does allege that he “avoid[ed] enrollment or  
2 participation in . . . activities [for gay students] on campus for fear of seeing Dr. Kapla.” SAC  
3 ¶ 43. Above, the Court concluded that Plaintiff has not adequately alleged that UCSF acted with  
4 deliberate indifference by failing to take adequate steps protect Plaintiff from Dr. Kapla after the  
5 sexual misconduct was reported. Even assuming that he had, however, Plaintiff has not included  
6 sufficient allegations from which the Court may reasonably infer that there was any likelihood that  
7 Plaintiff would encounter Dr. Kapla at UCSF-sponsored activities for gay students on campus and  
8 that Plaintiff therefore was vulnerable to further sexual harassment or assault. In addition to  
9 *Farmer*, *Williams*, and *Takla* (the cases cited in the Court’s previous order), Plaintiff relies on *Doe*  
10 *v. University of Alabama in Huntsville*, 177 F.Supp.3d 1380, 1384–86 (N.D. Ala. 2016), where the  
11 plaintiff, who had been raped by another student, saw her assailant on campus after—  
12 unbeknownst to plaintiff—a university official had appealed the student conduct board’s decision  
13 to immediately expel her rapist. Plaintiff also relies on *Spencer v. University of New Mexico*  
14 *Board of Regents*, No. 15-CV-141 MCA/SCY, 2016 WL 10592223, at \*6–7 (D.N.M. Jan. 11,  
15 2016), where the plaintiff withdrew from the university after being raped by other students due to  
16 her concern of encountering them. As Plaintiff notes, these cases demonstrate that plaintiffs may  
17 satisfy the fifth element when they are made vulnerable to further sexual harassment or assault,  
18 even if they do not experience further sexual harassment or assault. *See generally* Opp’n to  
19 Regents Mot. at 1–7. In particular, *Farmer*, *Williams*, *Takla*, and *Spencer* illustrate that plaintiffs  
20 may satisfy the fifth element even when they remove themselves from environments where they  
21 otherwise may have encountered their harassers or assailants. In all of the discussed cases,  
22 however, the harassers or assailants continued to go to the relevant campuses, so it was reasonable  
23 to infer that there was some likelihood the plaintiffs would encounter them there.<sup>13</sup> In the present  
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25       <sup>13</sup> *Fitzgerald*, 504 F.3d 165, one of the cases cited in the Court’s prior order and relied on by  
26 Plaintiff, is similar. *See* Order at 18–19 n.20; Opp’n to Regents Mot. at 3–7. In that case, an  
27 elementary school student alleged that, after she had been sexually harassed by another student,  
28 she had several “unsettling interactions” with her harasser at school. *Fitzgerald*, 504 F.3d at 170.  
The First Circuit suggested that a jury could reasonably find that the student was vulnerable to  
further sexual harassment (the fifth element), but ultimately affirmed summary judgment in favor  
of the school committee on the ground that a jury could not reasonably conclude that it had  
responded with deliberate indifference (the fourth element).

1 case, however, Plaintiff has not alleged that Dr. Kapla regularly went to UCSF’s campus, that  
2 Plaintiff had ever encountered Dr. Kapla on UCSF’s campus, or that he had ever encountered Dr.  
3 Kapla at UCSF-sponsored activities for gay students.<sup>14</sup> Without more, the Court cannot conclude  
4 that UCSF’s alleged failure to take additional steps to protect Plaintiff made him vulnerable to  
5 further sexual harassment or assault by Dr. Kapla.

6 Plaintiff also contends that Dr. Comelli’s remarks themselves constitute further sexual  
7 harassment and therefore satisfy the fifth element. *See Opp’n to Regents Mot.* at 2, 8. At the  
8 hearing, the Regents argued that the alleged remarks do not constitute *sexual* harassment and, even  
9 assuming they do, there is no deliberately indifferent action by UCSF that made Plaintiff  
10 vulnerable to such harassment. In response, Plaintiff contended that the remarks are attributable to  
11 UCSF because Dr. Comelli is an “agent” of the university.

12 Dr. Comelli’s alleged remarks—blaming Plaintiff, who is gay, for “inviting” Dr. Kapla’s  
13 alleged sexual harassment and assault—are *sexual* harassment.<sup>15</sup> That said, the Court agrees with  
14 the Regents that Dr. Comelli’s alleged remarks do not satisfy the fifth element of a post-

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16 <sup>14</sup> In his opposition to the Regents’ motion, Plaintiff cites three more cases. First, *Butters v.*  
17 *James Madison University*, 145 F.Supp.3d 610 (W.D. Va. Nov. 6, 2015) did not involve “similar”  
18 facts, as Plaintiff contends. There, the plaintiff was sexually assaulted by three other students, and  
19 a video recording of the assault later “circulated ‘throughout the [university] community.’ ” *Id.* at  
20 614. Although the university was aware of video and its dissemination, it responded with  
21 deliberate indifference by failing to take any action to stop the video’s spread and thereby  
22 subjected the plaintiff to further sexual harassment. *Id.* at 619–21. Second, *Doe v. University of*  
23 *Tennessee*, 186 F.Supp.3d 788 (M.D. Tenn. May 3, 2016) is inapposite because it involved pre-  
24 assault Title IX claims. Third, *Tubbs v. Stony Brook University*, 15 Civ. 0517 (NSR), 2016 WL  
25 8650463 (S.D.N.Y. Mar. 4, 2016) is inapposite because the court did not address the fifth element  
26 of a post-assault Title IX claim.

27 <sup>15</sup> To satisfy the second element of a post-harassment Title IX claim, the plaintiff “must have  
28 suffered harassment ‘that is so severe, pervasive, and objectively offensive that it can be said to  
deprive the [plaintiff] of access to the educational opportunities or benefits provided by the  
school.’ ” *Karasek*, 956 F.3d at 1105 (quoting *Davis*, 526 U.S. at 650). When a school’s  
deliberate indifference subjects a plaintiff to further sexual harassment, it is not clear whether the  
further sexual harassment also must be “so severe, pervasive, and objectively offensive that it can  
be said to deprive the [plaintiff] of access to the educational opportunities or benefits provided by  
the school.” *Id.* The parties have not raised the issue, and, to the Court’s knowledge, the Ninth  
Circuit has not addressed it. Even assuming that the further sexual harassment must rise to the  
same level as the original harassment, Plaintiff’s theory is that Dr. Comelli’s remarks effectively  
deprived him of educational opportunities and benefits (1) by causing him to withdraw from  
UCSF’s free therapy and (2) by contributing to his psychological and emotional trauma which  
caused Plaintiff to miss class, take a reduced course load, and withdraw from UCSF-sponsored  
activities.

1 harassment/assault Title IX claim under the high court’s guidance. In particular, the Supreme  
2 Court has “rejected the use of agency principles to impute liability” to a school for the misconduct  
3 of its employees and “declined the invitation to impose liability under what amounted to a  
4 negligence standard”—holding the school liable for its failure to react to faculty-on-student  
5 harassment of which it knew or should have known. *Davis*, 526 U.S. at 642 (citing *Gebser*, 524  
6 U.S. 274). Instead, the Supreme Court has explained that schools are only directly liable for their  
7 failure to reasonably respond to known acts of sexual discrimination that have occurred in a  
8 context subject to their control: “a damages remedy will not lie under Title IX unless an official  
9 who at a minimum has authority to address the alleged discrimination and to institute corrective  
10 measures on the recipient’s behalf has actual knowledge of discrimination in the recipient’s  
11 programs and fails adequately to respond.” *Gebser*, 524 U.S. at 290; *see Davis*, 526 U.S. at 643,  
12 645–46. In the typical, successful faculty-on-student sexual harassment case, a faculty member  
13 sexually harasses a student, the harassment is reported to an official who has the authority to direct  
14 the school’s response, the school responds with deliberate indifference, and—as a result of the  
15 school’s deliberate indifference—the student is further sexually harassed by the same faculty  
16 member or is vulnerable to such harassment. Here, Plaintiff alleges that Dr. Kapla sexually  
17 harassed and assaulted him, that the harassment and assault were reported to an appropriate  
18 official, that UCSF responded with deliberate indifference, and that Plaintiff was subsequently  
19 sexually harassed by Dr. Comelli. But Plaintiff does not allege that he was subjected to Dr.  
20 Comelli’s remarks as a result of UCSF’s deliberate indifference; to the contrary, there is no  
21 indication that it was clearly unreasonable for UCSF to continue to provide Plaintiff with free  
22 therapy with the same therapist who initially reported the sexual misconduct. *See SAC ¶¶ 21–24,*  
23 28. Additionally, Plaintiff does not allege that Dr. Comelli himself had any control over UCSF’s  
24 response to Plaintiff’s Title IX complaint; rather, the allegation that Dr. Comelli originally  
25 reported Dr. Kapla’s alleged sexual misconduct to Dean Jones and the Title IX office suggests that  
26 Dr. Comelli was not an official with the “authority to address the alleged discrimination [by Dr.  
27 Kapla] and to institute corrective measures on [UCSF’s] behalf.” *Gebser*, 524 U.S. at 290; *see*  
28

1 SAC ¶ 24. Under these circumstances, to conclude that Dr. Comelli's remarks are attributable to  
2 UCSF would exceed the prescribed limits on Title IX damages liability.

3 **3. Whether Claim One Fails to State a Pre-Harassment/Assault Title IX Claim**

4 In the First Amended Complaint, Plaintiff asserted multiple Title IX claims, but he did not  
5 distinguish between the pre- and post-harassment/assault theories of liability. *See generally* First  
6 Am. Compl. ("FAC," dkt. 1-2) at 8, 11, 15. Although most of Plaintiff's allegations concerned  
7 conduct that occurred after his alleged experience of sexual harassment and assault, Plaintiff also  
8 alleged that UCSF had failed to adequately train and supervise Dr. Kapla. *See* Order at 4 & n.5  
9 (citing FAC at 8). Additionally, in his opposition to the Regents' motion to dismiss the First  
10 Amended Complaint, Plaintiff indicated that, if he were granted leave to amend, he would allege  
11 that the University of California had a "policy and practice of deceptively handling sexual  
12 misconduct cases." *See id.* at 19 (citing FAC Opp'n (dkt. 20) at 6). For support, Plaintiff cited the  
13 California State Auditor's report that details several deficiencies in the University of California's  
14 handling of sexual harassment cases between 2009 and 2013. *See id.* (citing FAC Opp'n at 2-3,  
15 5-6).

16 Because these allegations concerned conduct that occurred *prior to* Plaintiff's alleged  
17 experience of sexual harassment and assault, the Court considered whether Plaintiff had  
18 adequately alleged a *pre*-harassment/assault Title IX claim. *See id.* at 19-20. As previously  
19 stated, the elements are as follows:

20 (1) a school maintained a policy of deliberate indifference to reports of sexual  
21 misconduct, (2) which created a heightened risk of sexual harassment that was  
22 known or obvious (3) in a context subject to the school's control, and (4) as a result,  
23 the plaintiff suffered harassment that was "so severe, pervasive, and objectively  
24 offensive that it can be said to [have] deprive[d] the [plaintiff] of access to the  
25 educational opportunities or benefits provided by the school." *Davis*, 526 U.S. at  
26 650.

27 *Karasek*, 956 F.3d at 1112. In its prior order, the Court concluded that Plaintiff had failed to state  
28 such a claim because "Plaintiff ha[d] failed to adequately allege a 'causal link' between the  
University of California's university-wide 'policy and practice of deceptively handling sexual  
misconduct cases' and the alleged sexual harassment and assault by Dr. Kapla . . . ." Order at 20.

1 In addition, the Court concluded that any pre-harassment/assault claim was barred by the  
2 applicable two-year statute of limitations. *Id.* The Court did not address equitable estoppel and/or  
3 equitable tolling because those issues were not adequately briefed, but it did instruct Plaintiff to  
4 include in his Second Amended Complaint allegations “to support equitable estoppel and/or  
5 equitable tolling, if applicable.” *Id.* at 20; *see id.* at 21 n.23. Accordingly, to the extent Plaintiff  
6 attempted to allege a pre-harassment/assault Title IX claim in the First Amended Complaint, the  
7 Court dismissed the claim with leave to amend. *Id.* at 20.

8 Like his First Amended Complaint, Plaintiff’s Second Amended Complaint does not  
9 distinguish between the pre- and post-harassment/assault theories of Title IX liability, and it  
10 includes some allegations of UCSF’s conduct prior to Plaintiff’s alleged experience of sexual  
11 harassment and assault. Although Plaintiff does not allege that UCSF failed to adequately train  
12 and supervise Dr. Kapla or that the University of California had a “policy and practice of  
13 deceptively handling sexual misconduct cases, he does reference the California State Auditor’s  
14 report. SAC ¶¶ 44–45. According to the operative complaint, this report concluded that  
15 University of California schools had not ensured that their faculty and staff were sufficiently  
16 trained on responding to and reporting incidents of sexual harassment and sexual violence; had not  
17 “always” complied with requirements for “distribution of relevant policies”; needed to do more to  
18 properly educate students on sexual harassment and sexual violence; and needed to better inform  
19 student complainants about the statuses and outcomes of their investigations. *Id.* ¶ 45. Plaintiff  
20 also alleges that on March 2, 2017—prior to Plaintiff’s experience of sexual misconduct—Sam  
21 Hawgood, the Chancellor of UCSF, sent a letter to the members of the UCSF community  
22 addressing sexual misconduct. *Id.* ¶ 2. In that letter, Chancellor Hawgood recognized that  
23 “between January 1, 2013 and April 6, 2016, at the ten campuses of the University of California,”  
24 there were 113 reported violations of the Title IX Sexual Violence and Sexual Harassment Policy,  
25 including 26 cases at UCSF. *Id.* Chancellor Hawgood also assured students that UCSF “ha[d]  
26 taken actions to both raise awareness of sexual violence and sexual harassment as well as to  
27 protect and support every member of the UCSF community” and that UCSF was committed to  
28 “clarity, fairness and timeliness” in its investigations and appropriate “remedies or disciplinary

1 actions” for every report of sexual misconduct. *Id.* According to Plaintiff, “[t]his is a case of  
2 Defendants’ failures of these representations.” *Id.* ¶ 3.

3 In their present motion to dismiss, the Regents argue that, to the extent Plaintiff seeks to  
4 bring a pre-harassment/assault Title IX claim, he has not cured the defects identified by the Court  
5 in its prior order. *See* Regents Mot. at 2, 10–13.

6 **a. Whether Any Pre-Harassment/Assault Claim Fails to Adequately Allege  
7 Causation**

8 First, the Regents contend that Plaintiff has failed to allege that any action or inaction by  
9 the University of California or UCSF was causally linked to his experience of sexual misconduct.  
10 Regents Mot. at 2, 5, 10–12. Plaintiff does not respond to this argument in his opposition. *See*  
11 *generally* Opp’n to Regents Mot.

12 The Court agrees with the Regents. First, the Ninth Circuit has explained that “[t]he  
13 element of causation ensures that Title IX liability remains within proper bounds. To that end,  
14 adequately alleging a causal link between a plaintiff’s harassment and a school’s deliberate  
15 indifference to sexual misconduct *across campus* is difficult.” *Karasek*, 956 F.3d at 1114 (italics  
16 added). Although the California State Auditor’s report details several deficiencies in the  
17 University of California’s handling of sexual harassment cases between 2009 and 2013, and  
18 although Dean Chancellor’s letter indicates that there were 26 reports of sexual misconduct at  
19 UCSF between January 1, 2013 and April 6, 2016, Plaintiff has not alleged that the University of  
20 California or UCSF maintained a policy of deliberate indifference to sexual misconduct across  
21 campus that created a heightened risk of sexual misconduct—let alone that Plaintiff was sexually  
22 harassed and assaulted as a result. Second, although the Ninth Circuit has recognized that “it may  
23 be easier to establish a causal link between a school’s policy of deliberate indifference and the  
24 plaintiff’s harassment when the heightened risk of harassment exists in a *specific program*,” *id.* at  
25 1113 (italics added), Plaintiff has failed to make the same allegations with respect to UCSF’s  
26 clerkships programs. *C.f. Karasek v. Regents of Univ. of Cal.*, No. 3:15-cv-03717-WHO, 2020  
27 WL 6684869, at \*18 (N.D. Cal. Nov. 12, 2020) (denying motion to dismiss where plaintiff had  
28 alleged an “unusually strong” causal link: “the same person who assaulted her had previously

1 assaulted another female student on a similar Club trip and the University did nothing to remedy it  
 2 and two other similar assaults happened in highly related contexts”). In brief, Plaintiff has failed  
 3 to allege or argue that his experience of sexual misconduct was causally linked to any prior action  
 4 or inaction by UCSF or the University of California.<sup>16</sup> So, to the extent the Second Amended  
 5 Complaint attempts to allege a pre-harassment/assault Title IX claim, the claim must be dismissed.

6 **b. Whether Any Pre-Harassment/Assault Claim is Time-Barred**

7 Second, the Regents argue that Plaintiff’s report of sexual misconduct did not equitably  
 8 toll the statute of limitations for any pre-harassment/assault Title IX claim because that report  
 9 involved a different set of facts: “the Title IX administrative proceedings centered” on the alleged  
 10 sexual harassment and assault, whereas any pre-harassment/assault Title IX claim “necessarily  
 11 centers on ‘events that occurred before’ ” the alleged sexual harassment and assault. Regents Mot.  
 12 at 13 (quoting *Karasek*, 956 F.3d at 1099). Meanwhile, Plaintiff stresses that he sought to resolve  
 13 “all issues” through UCSF’s Title IX office and, after the office advised him on October 16, 2018  
 14 that it had closed his case, he filed the present action “within the statutory time.”<sup>17</sup> Opp’n to  
 15 Regents Mot. at 9.

16 “In the absence of a federal statute of limitations, federal courts borrow not only the  
 17 applicable state statute, but also the rules for its tolling, unless to do so would be ‘ ‘inconsistent  
 18 with the federal policy underlying the cause of action under consideration.’ ’ ” *Alexopoulos ex rel.*  
 19 *Alexopoulos v. S. F. Unified Sch. Dist.*, 817 F.2d 551, 555 (9th Cir. 1987) (quoting *Bd. of Regents v.*  
 20 *Tomanio*, 446 U.S. 478, 485 (1980) (citation omitted). Because “Title IX does not expressly  
 21 provide any statute of limitations,” courts “borrow” the “applicable state statute of limitations for  
 22 personal injury actions.” *Stanley v. Trs. of Cal. State Univ.*, 433 F.3d 1129, 1136 (9th Cir. 2006).  
 23 Thus, the Court borrows California Code of Civil Procedure section 335.1, which establishes a  
 24

25 <sup>16</sup> Consequently, the Court need not decide the level of causation that is required to state a pre-  
 26 harassment/assault Title IX claim. *See Karasek v. Regents of Univ. of Cal.*, 2020 WL 6684869, at  
 27 \*18 (declining to decide whether a pre-harassment/assault Title IX claim requires but-for and  
 proximate causation or substantial factor causation where one plaintiff’s allegations satisfied both  
 standards and another plaintiff’s allegations satisfied neither).

28 <sup>17</sup> Plaintiff has not argued that the Regents should be equitably estopped from raising their statute  
 of limitations defense. *See generally* Opp’n to Regents Mot.

1 two-year limitations period for personal injury actions, and California’s equitable tolling doctrine,  
2 “unless to do so would be ‘ ‘inconsistent with the federal policy underlying’ ’ ” Title IX.  
3 *Alexopoulos*, 817 F.2d at 555 (citations omitted); *see Stanley*, 433 F.3d at 1136 (stating that  
4 California Code of Civil Procedure section 335.1 applies to Title IX claims filed after January 1,  
5 2003, when the section took effect).

6 The California Supreme Court recently reviewed the state’s equitable tolling doctrine in  
7 *Saint Francis Memorial Hospital v. State Department of Public Health*, 9 Cal.5th 710 (2020). It  
8 explained:

9 Equitable tolling is a “judicially created, nonstatutory doctrine” that “ ‘suspend[s] or  
10 extend[s] a statute of limitations as necessary to ensure fundamental practicality and  
11 fairness.’ ” *McDonald v. Antelope Valley Cnty. Coll. Dist.*, 45 Cal.4th 88, 99 (2008)  
12 (citations omitted). The doctrine applies “occasionally and in special situations” to  
13 “soften the harsh impact of technical rules which might otherwise prevent a good  
14 faith litigant from having a day in court.” *Addison v. State*, 21 Cal.3d 313, 316  
15 (1978). Courts draw authority to toll a filing deadline from their inherent equitable  
powers—not from what the Legislature has declared in any particular statute. *See Elkins v. Derby*, 12 Cal.3d 410, 420 n.9 (1974). For that reason, [courts] presume  
16 that statutory deadlines are subject to equitable tolling. *See Irwin v. Dep’t of  
17 Veterans Affairs*, 498 U.S. 89, 95–96 (1990).

18 *Id.* at 719–20. As the court explained, however, this “presumption can be overcome” where there  
19 is “explicit statutory language or a manifest policy underlying a statute [that] simply cannot be  
20 reconciled with permitting equitable tolling.” *Id.* at 720. If the presumption is not overcome,  
21 equitable tolling applies “when three ‘elements’ are present: ‘[ (1) ] timely notice, and [ (2) ] lack  
22 of prejudice, to the defendant, and [ (3) ] reasonable and good faith conduct on the part of the  
23 plaintiff.’ ” *Id.* at 724 (quoting *Addison*, 21 Cal.3d at 319). As is relevant here, equitable tolling  
24 may apply “ ‘[w]hen an injured person has several legal remedies and, reasonably and in good  
25 faith, pursues one.’ ” *McDonald*, 45 Cal.4th at 100 (citations omitted). In these circumstances,  
26 the doctrine may “afford[] grievants the opportunity to pursue informal remedies,” without  
27 “compromising defendants’ significant ‘interest in being promptly apprised of claims against them  
28 in order that they may gather and preserve evidence’ because that notice interest is satisfied by the  
filing of the first proceeding that gives rise to tolling.” *Id.* (quoting *Elkins*, 12 Cal.3d at 417–18  
(citations omitted)).

1 Plaintiff's pre-harassment/assault allegations are scarce, and the parties have not squarely  
 2 addressed whether Plaintiff has adequately alleged the elements necessary for the application of  
 3 equitable tolling under California law: (1) that the Regents had timely notice of Plaintiff's claim  
 4 and his intent to litigate, (2) that the Regents would not be prejudiced by the application of  
 5 equitable tolling, and (3) that Plaintiff acted reasonably and in good faith.<sup>18</sup> *Saint Francis Mem'l*,  
 6 9 Cal.5th at 724–30. For these reasons and because the Court has already concluded that Plaintiff  
 7 has failed to adequately allege causation in support of any pre-harassment/assault Title IX claim,  
 8 the Court does not address whether any such claim is also time-barred.

9 **c. Claim One is Dismissed With Leave to Amend**

10 Above, the Court has identified defects with Plaintiff's Title IX claim under both the pre-  
 11 and post-harassment/assault theories of liability. At the hearing, Plaintiff's counsel made a  
 12 number of representations which suggest that Plaintiff may be able to cure these defects.  
 13 Consequently, the Court grants Plaintiff leave to amend his complaint to allege a Title IX claim  
 14 against the Regents under either or both theories of liability.

15 **C. Whether Plaintiff's State Claims (Claims Two Through Seven) Fail to State a Claim**

16 **1. Applicable Statutes of Limitations and Tolling Doctrine**

17 Plaintiff's state claims are governed by California's statutes of limitations and equitable  
 18 tolling doctrine. *Centaur Classic Convertible Arbitrage Fund Ltd. v. Countrywide Financial*  
 19 *Corp.*, 878 F.Supp.2d 1009, 1015 (9th Cir. 2011). With the exception of his sexual harassment  
 20

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21 <sup>18</sup> In their papers, the Regents, quoting *FEC v. Williams*, 104 F.3d 237, 240–41 (9th Cir. 1996),  
 22 argue that equitable tolling applies only if Plaintiff proves “the following elements: fraudulent  
 23 conduct by the defendant resulting in concealment of the operative facts, failure of the plaintiff to  
 24 discover the operative facts that are the basis of its cause of action within the limitations period,  
 25 and due diligence by the plaintiff until discovery of those facts.” Regents Mot. at 12; *see* Regents  
 26 Reply at 5–6. Their reliance on *FEC v. Williams* is misplaced because that case involved 28  
 27 U.S.C. § 2462, the federal statute of limitations that “applies to FEC actions for the assessment or  
 28 imposition of civil penalties under [the Federal Election Campaign Act].” *FEC v. Williams*, 104  
 F.3d at 240. Accordingly, the Ninth Circuit in *FEC v. Williams* had no occasion to apply  
 California's equitable tolling doctrine. *C.f. Alexopoulos*, 817 F.2d at 555.

Meanwhile, Plaintiff relies on *McDonald*, 45 Cal.4th 88, and *Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131 (9th Cir. 2001). While these cases are apt and Plaintiff analogizes his case in general terms, he never specifically argues that he has adequately alleged the three elements necessary for the application of equitable tolling. *See* Opp'n to Regents Mot. at 8–10.

1 claim, each of Plaintiff's state claims is subject to a two-year statute of limitations. *See* Cal. Code  
 2 Civ. Proc. § 335.1 (two-year statute of limitations for "an action for assault, battery, or injury  
 3 to . . . an individual caused by the wrongful act or neglect of another"); *see also Flores v.*  
 4 *Presbyterian Intercommunity Hosp.*, 63 Cal.4th 75, 79 (2016) (section 335.1 applies to ordinary  
 5 negligence); *Pugliese v. Super. Ct.*, 146 Cal.App.4th 1444, 1450 (2007) (applying section 335.1 to  
 6 intentional infliction of emotional distress); *Johnson v. Lucent Techs. Inc.*, 653 F.3d 1000, 1008  
 7 (9th Cir. 2011) (same); *see also* Cal. Code Civ. Proc. § 339(1) (two-year statute of limitations for,  
 8 among other things, an "action upon a contract, obligation or liability not founded upon an  
 9 instrument of writing").<sup>19</sup> Plaintiff's sexual harassment claim is subject to the California Fair  
 10 Employment and Housing Act's former one-year limitations period that was in effect until  
 11 December 31, 2019.<sup>20</sup> *See* Cal. Gov. Code § 12960(d) (2019).

12 Under California law, the general rule is the " 'last element' accrual rule": a statute of  
 13 limitations ordinarily runs "from 'the occurrence of the last element essential to the cause of  
 14 action.' " *Aryeh v. Canon Bus. Solutions, Inc.*, 55 Cal.4th 1185, 1191 (2013) (citations omitted).  
 15 Plaintiff does not dispute that each of his state claims against Dr. Kapla accrued on or before  
 16 August 20, 2017, when his clerkship with Dr. Kapla ended, and more than two years before the  
 17 present action was filed in state court on January 24, 2020. Thus, the only issue is whether the  
 18 doctrine of equitable tolling saves Plaintiffs' otherwise-time-barred claims. If Plaintiff's report of  
 19 sexual misconduct to UCSF equitably tolled the statutes of limitations for Plaintiff's negligence,  
 20 intentional infliction of emotional distress, assault, battery, and breach of the covenant of good

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21  
 22 <sup>19</sup> The Court need not decide whether section 335.1 or section 339(1) of the California Code of  
 23 Civil Procedure governs Plaintiff's claim for breach of the covenant of good faith and fair dealing  
 24 because both sections establish two-year limitations periods. *See Richardson v. Allstate Ins. Co.*,  
 25 117 Cal.App.3d 8,13 (1982) (applying section 339(1)); *compare Rattagan v. Uber Techs., Inc.*,  
 26 No. 19-cv-01988-EMC, 2020 WL 4818612, at \*3 (N.D. Cal. Aug. 19, 2020) (applying section  
 27 335.1) *with Leon v. Wells Fargo Bank*, No. 17-cv-03371-BLF, 2018 WL 3474182, at \*3 (N.D.  
 28 Cal. July 19, 2018) (applying section 339(1)).

29 <sup>20</sup> Although the Second Amended Complaint does not expressly state that Plaintiff's sexual  
 30 harassment claim arises under the California Fair Employment and Housing Act (FEHA), Dr.  
 31 Kapla construes it as doing so, and Plaintiff has not indicated otherwise. *See* Kapla Mot. at 4; *see*  
 32 *also Medix Ambulance Service, Inc. v. Super. Ct.*, 97 Cal.App.4th 109, 118–19 (2002) ("[T]he  
 33 cause of action for sexual harassment is a creature of statute."); *Myers v. Trendwest Resorts, Inc.*,  
 34 148 Cal.App.4th 1403, 1426 (2007) ("There is no common law cause of action for sexual  
 35 harassment.").

1 faith and fair dealing claims from August 2017—when Plaintiff reported the sexual misconduct to  
2 UCSF and was removed from his clerkship with Dr. Kapla—to October 2018—when UCSF  
3 informed Plaintiff that it had closed his case, then these claims would have been timely filed.  
4 Even assuming that equitable tolling applies to Plaintiff’s sexual harassment claim, however, that  
5 claim would have been filed after the one-year limitations period would have expired in October  
6 2019.<sup>21</sup> *See* Cal. Gov. Code § 12960(d) (2019). Because this defect is apparent from the face of  
7 the Second Amended Complaint, it must be dismissed. *Jablon*, 614 F.2d at 682.

8 As explained above, California law presumes that statutes are subject to equitable tolling,  
9 *see Saint Francis Mem’l*, 9 Cal.5th at 720, and there is no indication that equitable tolling is  
10 incompatible with the applicable statutes of limitations for Plaintiff’s remaining common law  
11 claims. *C.f. Lantzy v. Centex Homes*, 31 Cal.4th 363, 371 (2003) (observing that the presumption  
12 had been overcome in cases where the California Legislature had expressly precluded or limited  
13 equitable tolling and where equitable tolling was inconsistent with the statutory text or legislative  
14 policy); *id.* at 373 (suggesting that equitable tolling is not inconsistent with the text of California’s  
15 “garden-variety” limitations statutes,” including sections 335 and 339 of the California Code of  
16 Civil Procedure). Accordingly, the Court considers whether Plaintiff has adequately alleged the  
17 three elements necessary for the application of equitable tolling: (1) that Dr. Kapla had timely  
18 notice of Plaintiff’s claims and his intent to litigate, (2) that Dr. Kapla would not be prejudiced by  
19 the application of equitable tolling, and (3) that Plaintiff acted reasonably and in good faith. *Saint*  
20 *Francis Mem’l*, 9 Cal.5th at 724.

21 Effective January 1, 2020, California Assembly Bill 9 of the 2019–20 legislative session  
22 extended the limitations period for sexual harassment claims to three years. *See* Cal. Gov. Code  
23 § 12960(e) (as amended by A.B. No. 9 § 1, 2019–20 Sess. (Cal. 2019)). As the California  
24 Supreme Court has explained, however, “Once a claim has lapsed (under the formerly applicable  
25 statute of limitations), revival of the claim is seen as a retroactive application of the law under an  
26 enlarged statute of limitations. Lapsed claims will not be considered revived without express  
27 language of revival.” *See Quarry v. Doe I*, 53 Cal.4th 945, 957 (2012). Meanwhile, Assembly  
28 Bill 9 expressly provides, “This act shall not be interpreted to revive lapsed claims.” A.B. No. 9  
§ 3, 2019–20 Sess. (Cal. 2019).

**2. Whether Claims Two Through Five and Claim Seven Are Time-Barred****a. Whether Dr. Kapla had Timely Notice**

The first element of equitable tolling “ought to be interpreted literally: When confronted with equitable tolling claims, courts must examine each case on its facts to determine whether the defendant received timely notice of the plaintiff’s intent to file suit.” *Saint Francis Mem’l*, 9 Cal.5th at 727. In the Second Amended Complaint, Plaintiff alleges that, pursuant the U.S. Department of Education’s Questions and Answers on Campus Sexual Misconduct, a school “should provide written notice to the responding party of the allegations constituting a potential violation of the school’s misconduct policy” once the school “decides to open an investigation that may lead to disciplinary action against the responding party.” SAC ¶ 15. This guidance allegedly provides that the notice should include “sufficient details . . . to prepare a response before any initial interview” including “the identities of the parties involved, the specific section of the code of conduct allegedly violated, the precise conduct allegedly constituting the potential violation, and the date and location of the alleged incident.” *Id.* Additionally, Plaintiff alleges that according to UCSF’s “Medical Student Education Policy for Volunteer Clinical Professor Roles and Responsibilities,” a Volunteer Clinical Professor’s appointment may be terminated “for cause, such as . . . when, in the opinion of the Dean or designee, . . . the conduct or performance of the appointee does not warrant continued appointment,” provided that the Dean or designee gives the professor “30 (thirty) consecutive days prior written notice with a statement of the reason for the termination.” *Id.* ¶ 19. Referring to these policies and UCSF’s potential need to “indemnify” Dr. Kapla, Plaintiff alleges that UCSF “had an obligation to, and did in fact advise Dr. Kapla of the charges against him by Plaintiff.” *Id.* ¶ 20. Further, Plaintiff alleges that, according to “[r]ecords obtained from UCSF,” UCSF would notify Dr. Kapla that he was “no longer a volunteer due to a ‘severe’ complaint of sexual harassment against him.” *Id.* Consequently, Plaintiff alleges, Dr. Kapla “had ample opportunity to gather evidence and to avoid prejudice in the event of litigation.” *Id.*

Dr. Kapla contends these allegations are insufficient to demonstrate that he was alerted to the need to begin investigating the facts that would form the basis of the present claims. *See*

1 Kapla Mot. at 6–7. Dr. Kapla also attempts to distinguish prior cases where plaintiffs’ pursuits of  
2 alternate remedies have equitably tolled statutes of limitations on the ground that he was not  
3 provided with a “formal complaint.” *Id.* at 6 (citing *Elkins*, 12 Cal.3d 410, and *Addison*, 21 Cal.3d  
4 313). Finally, Dr. Kapla relies on *Salazar v. Regents of University of California*, No. 16-cv-  
5 05235-EDL, 2017 WL 4586831 (N.D. Cal. Apr. 27, 2017), *affr’d*, 812 Fed.Appx. 410 (9th Cir.  
6 2020), where “a medical student also filed a complaint about alleged misconduct at UCSF,  
7 triggering an . . . investigation” by the U.S. Department of Education’s Office of Civil Rights  
8 (OCR), and where the court “concluded that “the earlier administrative complaint[s] did not  
9 provide adequate notice to the Regents or the individually named defendants, even when the  
10 individual defendants allegedly received copies of the complaints and/or were to be told about the  
11 complaint[s].” *Id.* at 7.

12 “When considering whether a plaintiff provided timely notice, courts focus on whether the  
13 party’s actions caused the defendant to be ‘fully notified within the [statute of limitations] of  
14 plaintiffs’ claims and their intent to litigate.’ ” *Saint Francis Mem’l*, 9 Cal.5th at 726 (quoting  
15 *Addison*, 21 Cal.3d at 321). Contrary to Dr. Kapla’s suggestion, the caselaw contains no  
16 requirement that a defendant must be provided with a “formal complaint” in order for the  
17 plaintiff’s pursuit of an alternate remedy to equitably toll the statute of limitations for a claim later  
18 filed in court. *See generally Elkins*, 12 Cal.3d 410 (statute of limitations equitably tolled while  
19 plaintiff pursued a worker’s compensation claim against defendant based on the same set of facts,  
20 even though there was no exhaustion requirement that plaintiff pursue worker’s compensation  
21 claim prior to filing a civil action); *Addison*, 21 Cal.3d 313 (statute of limitations equitably tolled  
22 while plaintiff pursued an action in federal court based upon the same set of facts). Additionally,  
23 in *Salazar*, the court held that the plaintiff’s internal UCSF complaint and external OCR  
24 complaints did not provide timely notice to “the broad set of institutional and individual  
25 defendants” because the plaintiff did not allege that the complaints covered “identical or similar  
26 claims” to the civil action or that the defendants were notified of the fourth OCR complaint, which  
27 was the only one that came “after major developments in his case.” 2017 WL 4586831, at \*8–9.  
28 Meanwhile, in the present case, Dr. Kapla—the sole defendant—was allegedly notified of

1 Plaintiff's allegations of his misconduct—which form the basis of Plaintiff's present claims—after  
2 the conclusion of Plaintiff's clerkship with Dr. Kapla.

3 Tellingly, Dr. Kapla argues that “[t]here is no *factual* basis to conclude that Dr. Kapla was  
4 advised” of Plaintiff's allegations of his misconduct and that Plaintiff has failed to meet the  
5 “evidentiary test.” Kapla Mot at 6 (italics added). But at this stage, Plaintiff's well-pleaded  
6 allegations are presumed to be true and construed in the most favorable light. Assuming that  
7 UCSF did in fact notify Dr. Kapla that he had been removed as a member of UCSF's Volunteer  
8 Clinical Faculty “due to a ‘severe’ complaint of sexual harassment against him,” SAC ¶ 20, it is  
9 reasonable to infer that Dr. Kapla was sufficiently apprised of Plaintiff's allegations against him  
10 and the need to defend himself, due to the ongoing Title IX investigation process and the  
11 likelihood of subsequent litigation. Although there may be factual disputes over when Dr. Kapla  
12 was notified and the extent to which he was informed of the specific allegations against him, those  
13 disputes cannot be resolved at this stage.

14 **b. Whether Dr. Kapla Would be Prejudiced by the Application of Equitable  
15 Tolling**

16 The “core focus” of the second element, lack of prejudice to the defendant, is “whether  
17 application of equitable tolling would prevent the defendant from defending a claim on the  
18 merits.” *Saint Francis Mem'l*, 9 Cal.5th at 728 (citing *Addison, supra*, 21 Cal.3d at 318). As  
19 previously noted, Plaintiff has alleged that because UCSF notified Dr. Kapla that he was “no  
20 longer a volunteer due to a ‘severe’ complaint of sexual harassment against him,” Dr. Kapla “had  
21 ample opportunity to gather evidence and to avoid prejudice in the event of litigation.” SAC ¶ 20.

22 In his motion, Dr. Kapla again relies on *Salazar*, where the court stated, “Although the two  
23 sets of claims need not be identical, the facts must be sufficiently similar that the defendant's  
24 investigation of the first claim will enable a fair defense of the second.” Kapla Mot. at 7 (quoting  
25 *Salazar*, 2017 WL 4586831, at \*9 (citation omitted)). Dr. Kapla also argues that because he “left  
26 [UCSF] before the suit was filed,” he “had/has no ability to go back in time and recreate lost  
27 documents, emails, information, or other ‘evidence’ that would be used to respond to Plaintiff's  
28 belated claim.” *Id.* Plaintiff responds that, “[u]pon learning that he was removed from the UCSF

1 program for ‘severe’ allegations against him in [Plaintiff’s] matter, Dr. Kapla had an opportunity  
2 to preserve evidence, or do anything to protect his rights.” Opp’n to Kapla Mot. at 4. Plaintiff  
3 also contends that “it is unlikely that there will be physical evidence in this case which needed to  
4 be preserved.” *Id.*

5 *Salazar* is again inapposite because the facts that formed the basis of the plaintiff’s internal  
6 UCSF and external OCR complaints were not “sufficiently similar” to those that formed the basis  
7 of his subsequent civil action. 2017 WL 4586831, at \*9. Here, Plaintiff’s report of sexual  
8 misconduct was based on the same set of allegations as the present claims against Dr. Kapla.

9 Again, on a motion to dismiss, Plaintiff’s allegations are presumed true and construed in  
10 the most favorable light. Upon learning that he had been removed from his role as a Volunteer  
11 Clinical Faculty member “due to a ‘severe’ complaint of sexual harassment against him,” SAC  
12 ¶ 20, Dr. Kapla should have begun gathering evidence and preparing his defense against such  
13 allegations—the same allegations that form the basis of Plaintiff’s present claims against Dr.  
14 Kapla. While there may be factual disputes concerning Dr. Kapla’s ability do so, they cannot be  
15 resolved on a motion to dismiss.

### 16 c. Whether Plaintiff Acted Reasonably and in Good Faith

17 The third element of equitable tolling requires reasonable and good faith conduct by the  
18 plaintiff. The reasonableness prong requires the plaintiff to demonstrate that the late filing was  
19 “*objectively* reasonable under the circumstances.” *Saint Francis Mem’l*, 9 Cal.5th at 729 (italics  
20 added). Meanwhile, the good faith prong requires the court to determine whether the late filing  
21 was “*subjectively* in good faith—whether it was the result of an honest mistake or was instead  
22 motivated by a dishonest purpose.” *Id.* (italics added).

23 Dr. Kapla contends that it was not objectively reasonable for Plaintiff to have taken  
24 “absolutely no action to prosecute his claims for another 14 months” after he “learned of the  
25 closed investigation on October 16, 2018.” Kapla Mot. at 8. For support, Dr. Kapla cites *Salazar*,  
26 where the court concluded that it was not objectively reasonable for the plaintiff to have “waited  
27 almost four years after his dismissal from UCSF to file [the] action, and more than four years after  
28 many of his alleged discriminatory comments and actions.” *Id.* (quoting *Salazar*, 2017 WL

1 4586831, at \*9). *Salazar* observed that even if equitable tolling applied “very expansively,” the  
2 relevant statutes of limitations “would have nearly run.” *Id.* (quoting *Salazar*, 2017 WL 4586831,  
3 at \*9). Further, Dr. Kapla asserts that Plaintiff “failed to diligently follow-up on the investigation  
4 while it might have been pending.” *Id.* In response, Plaintiff contends that he “fully cooperated  
5 with the UCSF Title IX officer and their investigation” and “put his trust in UCSF” to “assist him  
6 in getting the help he needed following Dr. Kapla’s harassment.” Opp’n to Kapla Mot. at 4.

7 The objective reasonableness prong “focuses not on a party’s intentions or the motives  
8 behind a party’s actions, but instead on whether that party’s actions were fair, proper, and sensible  
9 in light of the circumstances.” *Saint Francis Mem’l*, 9 Cal.5th at 729. The California Supreme  
10 Court has explained that this analysis is akin to the one used to assess deficient performance for  
11 ineffective assistance of counsel claims. *Id.* Assuming that the statutes of limitations were  
12 equitably tolled from August 2017 to October 2018, Plaintiff’s remaining state claims, filed on  
13 January 24, 2020, would have been filed well within the applicable two-year limitations periods.  
14 Also, Plaintiff has alleged that while UCSF investigated his report of sexual harassment and  
15 assault, he relied on UCSF officials’ statements that he need not hire a lawyer. SAC ¶¶ 34–39,  
16 46–47, 49. In light of these circumstances, it was not objectively unreasonable for Plaintiff to  
17 have filed the present action 14 months after UCSF informed him that it had closed his case.  
18 Finally, there is no indication that Plaintiff’s late filing of these claims was due to anything other  
19 than an honest mistake. Therefore, Plaintiff has adequately pleaded the third element of equitable  
20 tolling.

21 **d. At This Stage, Claim Six is Time-Barred, but Claims Two Through Five  
22 and Claim Seven Are Not**

23 Because the allegations of the Second Amended Complaint permit Plaintiff to prove that  
24 the applicable statutes of limitations were equitable tolled while UCSF was investigating his report  
25 of sexual misconduct, the Court declines to dismiss Plaintiff’s negligence, intentional infliction of  
26 emotional distress, assault, battery, and breach of the covenant of good faith and fair dealing  
27 claims on timeliness grounds. *See Jablon*, 614 F.2d at 682. Additionally, because Plaintiff may  
28 be able to cure the defects of his federal claim, the Court continues to exercise supplemental

1 jurisdiction over these state claims in the interest of judicial economy. *See* 28 U.S.C.  
2 § 1367(c)(3).

3 As explained above, however, even assuming that equitable tolling applies to Plaintiff's  
4 sexual harassment claim, it was not filed within the applicable one-year limitations period.  
5 Because it is clear that Plaintiff cannot cure this defect, the Court dismisses that claim with  
6 prejudice.<sup>22</sup>

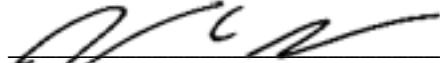
7 **IV. CONCLUSION**

8 For the reasons stated above, the motions to dismiss are GRANTED in part and DENIED  
9 in part. Claims One through Five and Claim Seven are dismissed with leave to amend, and Claim  
10 Six is dismissed with prejudice.

11 Plaintiff may file a third amended complaint no later than January 18, 2021 to allege  
12 additional specific facts in support of his claims, consistent with the discussion above. He may  
13 not add any new claims, or new parties, without leave of the Court.

14  
15 **IT IS SO ORDERED.**

16 Dated: December 18, 2020

17   
18 JOSEPH C. SPERO  
Chief Magistrate Judge

19  
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23  
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25  
26 <sup>22</sup> Plaintiff's First Amended Complaint did not include a sexual harassment claim, and the Court's  
27 order dismissing the First Amended Complaint clearly stated that Plaintiff could not add any new  
28 claims without leave of the Court. *See* Order at 21. Plaintiff therefore added the sexual  
harassment claim in violation of the Court's prior order, which itself is a separate and sufficient  
reason to strike the claim.